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NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

INDEPENDENT COMMUNITY BANKERS
ASSOCIATION OF SOUTH DAKOTA, INC.

Petitioner,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,

Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DOUGLAS AMENDMENT, § 3(d) OF THE BANK HOLDING ACT (BHCA), AUTHORIZES A BANK HOLDING COMPANY TO ACQUIRE AND OPERATE A LIMITED SERVICE NATIONAL BANK LOCATED OUTSIDE THE HOLDING COMPANY'S HOME STATE.

II.

WHETHER THE SOUTH DAKOTA BANK ACQUISITION STATUTES, WHICH CONDITION THE ACTIVITIES OF NATIONAL BANKING ASSOCIATIONS, CONFLICT WITH AND FRUSTRATE FEDERAL BANKING LAW.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Independent Community Bankers Association of South Dakota, Inc., has been a party to this litigation from the beginning, and will be referred to as "ICBA." Respondent, Board of Governors of the Federal Reserve System, has also been a party to this litigation from the beginning, and will be referred to as the "Board." The Intervenor below, First City Bancorporation of Texas, Inc., has been party to this litigation from the beginning as well and will be referred to as "First City."

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The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported as Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System, 820 F.2d 428 (D.C. Cir. 1987) and is reprinted in the Joint Appendix at A-1-30.

The Decision of the Board has not been reported. It is reprinted in the Joint Appendix at A-33-42.

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Respondent.

and

FIRST CITY BANCORPORATION OF TEXAS, INC.

Respondent-Intervenor.

ICBA respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 5, 1987.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 5, 1987. See A-31-32. A Petition for a Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. U.S. Const. art. VI, cl. 2:

   This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

2. 12 U.S.C. § 36(c) (1982), 12 U.S.C., § 36(h) (1982), 12 U.S.C., § 1841(a)(1) (1966), 12 U.S.C., § 1841(a)(5) (1966), 12 U.S.C., § 1841(b) (1966), 12 U.S.C., § 1841(c) (1966), 12 U.S.C., § 1842(d) (1966), 12 U.S.C. § 1848, (1956), which are set forth at A-43-50.

3. S.D. Codified Laws Ann. §§ 51-16-40 (1983), 51-16-41 (1983), 51-16-42 (1983), 51-16-43 (1980), 51-16-44 (1980), which are set forth at A-51-54.

STATEMENT OF THE CASE

First City is a Texas corporation and bank holding company which applied to the Board to obtain approval for the acquisition of a South Dakota national bank. The bank would engage primarily in offering bank credit card services to customers in states other than South Dakota. The national bank to be acquired is located in Sioux Falls, South Dakota. ICBA, a trade association representing chartered national and state banks located in South Dakota, opposed this proposed acquisition in proceedings before the Board. The Board approved the acquisition, and the Court of Appeals for the District of Columbia Circuit affirmed the Order of the Board. ICBA now seeks a Writ of Certiorari, on the basis that the acquisitions were not authorized by the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. § 1841 et seq., and that, if they were authorized by the Act, the South Dakota statutes which permitted the acquisition violated federal law.

The Bank Holding Company Act (BHCA), 12 U.S.C. § 1841 et seq., regulates the acquisition of state and national banks by bank holding companies. The Act generally defines a bank as any institution organized under state or federal law which "... (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans ...." 12 U.S.C. § 1841(c). The Act defines a bank holding company as any corporation, partnership, business trust, association or similar organization that owns or has control over a bank or another bank holding company. §§ 1841(a)(1), (b); see § 1841(a)(5). Before a company may become a bank holding com-

pany, or a bank holding company may acquire a bank or substantially all of the assets of a bank, the Act requires it to obtain the approval of the Board. 12 U.S.C. § 1842.

The Board will evaluate the proposed transaction for anticompetitive effects, financial and managerial resources, community needs, and the like. 12 U.S.C. § 1842(c). In addition, § 3(d) of the Act, 12 U.S.C. § 1842(d), known as "the Douglas Amendment," prohibits the Board from approving an application of a bank holding company or bank located in one state to acquire a bank located in another state, or substantially all of its assets, unless the acquisition "is specifically authorized by the statute laws of the state in which such bank is located, by language to that effect and not merely by implication." Pursuant to the Douglas Amendment, a number of states, including South Dakota, recently have enacted "special purpose" bank acquisition statutes. Generally these statutes permit out-of-state organizations to set up in-state banks that do not compete with locally controlled full-service banks. This case requires the Court to consider the validity of these statutes.

From 1956 to 1972, the Douglas Amendment had the effect of completely barring interstate bank acquisitions because no state had enacted the requisite authorizing statute. Beginning in 1972, several states passed statutes permitting such acquisitions in limited circumstances for specialized purposes.

In 1980, South Dakota enacted its special purpose legislation designed to lift the Douglas Amendment's ban on interstate acquisitions. In relevant part, the

South Dakota's bank acquisition statutes (S.D. Codified Laws Ann. §§ 51-16-40, -41, -42,) see A-51-53, permit an out-of-state bank holding company to acquire "all or substantially all of the shares of a single new bank which is established under the laws of this state. . . and a single new national bank which is to be located in this state." S.D. Codified Laws Ann. § 51-16-40(a) (1983). The South Dakota statutes limit the operation of such acquired banks to a single banking office. They also require that the office "be operated in a manner and at a location which is not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state. Id. § 51-16-41. In addition, the South Dakota statutes make all such interstate bank acquisitions subject to the approval of the South Dakota Banking Commission (the "Commission") and to any conditions that the Commission deems necessary.

On May 3, 1984, First City submitted a proposal to the Commission to acquire a nationally chartered bank to be located in Sioux Falls and designed to engage primarily in offering bank credit card services to customers in the states of Texas, Louisiana, Arkansas, Oklahoma, Colorado and New Mexico. The Commission authorized the proposed acquisition, subject to the conditions prescribed by the South Dakota bank acquisition statutes, and rendered its final approval contingent on approval by the Comptroller of the Currency (the "Comptroller") and the Board. Shortly thereafter, the Comptroller granted preliminary approval for the requested national bank charter, thereby clearing the way for the final steps in organizing the bank. First

City then applied to the Board under § 3(a)(3) of the BHCA to acquire all of the voting shares of the newly chartered national bank.

ICBA intervened in the proceedings before the Board, opposing First City's application. In an Order dated July 12, 1985, the Board approved First City's application.

Pursuant to 12 U.S.C. § 1848, which allows "[a]ny party aggrieved by an order of the Board" to seek review in a federal court of appeals, see A-49, IBCA timely filed a Petition for Review of the Board's decision with the United States Court of Appeals for the District of Columbia Circuit. On June 5, 1987, the Court of Appeals denied the ICBA's petition. 820 F.2d at 440-41.

REASONS FOR GRANTING THE WRIT

I.

DOUGLAS AMENDMENT ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. Whether the Douglas Amendment Allows States to Permit the Acquisition of National Banks Raises an Important and Novel Question of Statutory Construction.

ICBA argued below that the Douglas Amendment does not authorize a state to permit an out-of-state bank holding company to acquire a national bank located within its borders. As the Court of Appeals recognized, see 820 F.2d at 432, this claim presents a novel question of statutory construction. Although Congress enacted the Douglas Amendment more than thirty (30) years ago, to date, neither the Board nor any Court has ever addressed this issue. Id. During the past fifteen years, the Board has routinely approved the acquisition of national banks in states that have statutes under the Douglas Amendment which allow the acquisition of in state banks by out-of-state holding companies. This is the first time, however, that a party has claimed that the Douglas Amendment limits interstate acquisition to state banks only. In light of the novelty of this issue, review by this Court through a Writ of Certiorari is necessary.

2. The Ambiguous Language and Legislative History of the Douglas Amendment Raises an Important and Novel Question of Statutory Interpretation.

The Douglas Amendment consists of two operative provisions. The first provision prohibits interstate bank holding company expansion generally. The second provision provides for the lifting of this ban under certain circumstances. The dispute in this case centers around the scope and effect of the second provision of the Douglas Amendment, which provides in pertinent part as follows:

> . . . no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on [July 1, 1966,] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-state bank holding company is specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication. . . .

12 U.S.C. § 1842(d). (Emphasis added) The Court of Appeals opined that this provision, and the Douglas Amendment as a whole, permitted an out-of-state bank holding company to acquire an in-state national bank if the state in which the national bank is located has authorized the interstate acquisition of local state chartered banks. The Court's opinion, however, represents an erroneous and over-inclusive reading of the Douglas Amendment and particularly the second provision of the amendment. If anything, the language and legislative history are ambiguous. Interpretation by this Court, therefore, is necessary to extend guidance to federal and state banking authorities and to the banking industry.

a. The language of the Douglas Amendment is ambiguous.

Prior to 1966, the BHCA defined "bank" as "any national banking association or any State bank, savings bank, trust company . . .". See Explanatory Notes to 12 U.S.C. § 1841(c). The Act, therefore, up until 1966, distinguished between "national banks" and "state banks".

In 1966, Congress amended the definition of "banks" to encompass "institution[s] organized under the laws of the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa [and] the Virgin Islands." See 12 U.S.C. § 1841(c). Congress, did not alter in 1966 or at any time subsequent thereto, the language of § 3(d) of the BHCA which continues to distinguish "State banks" from "banks" in general. Had Congress desired to broaden the scope of § 3(d) to include acquisitions of national banks, it would have done so in 1966 or in a subsequent amendment, by inserting the generic word "bank" in the place of the specific words "State bank." Instead, readers of the Act are left wondering why § 3(d) still makes reference to "State bank" and whether the Douglas Amendment is intended to include acquisitions of national banks. Since no prior interpretative precedent exists of the Douglas Amendment and the amendment's language is ambiguous on its face, this Court should grant certiorari and provide a definitive interpretation.

b. The legislative history of the Douglas Amendment is likewise ambiguous.

Moreover, the legislative history of the Douglas Amendment is ambiguous and provides little interpretative assistance in evincing congressional intent. The amendment's entire legislative history is confined to the Senate floor debate and particularly the remarks of Senators Payne and Douglas.

According to one of the co-sponsors of the amendment, Senator Payne, the purpose of the amendment was to facilitate state's rights and control over state banks. In doing so, Senator Payne remarked as follows:

> . . . This amendment would require that state legislatures pass specific legislation authorizing bank holding companies from another state to acquire interests in State banks located within its borders. The purpose of this Amendment is to return to the State their traditional control over the activities of the State banks now nominally under the State's authority.
>
> * * *
>
> . . . It is not my intention to question the capacity of the Federal Reserve Board to carry out the will of the Congress, but it seems to me that the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State government and is an area best left to their discretion rather than to have it

> solely under the jurisidiction of the Federal Reserve Board.
>
> * * *
>
> ... The Douglas Amendment would reestablish State authority over State banks. ...

102 Cong. Rec. 6862 (1956); c.f. A-58-60. As evidenced by Senator Payne's comments, the floor debate concerning the Douglas Amendment took on a state's rights air. The purpose of the Douglas Amendment, in Senator Payne's view, was to allow the state, as opposed to Congress, to determine if any state wished to have an out-of-state bank holding company do business within its borders.

Senator Douglas on the other hand believed:

> (w)hat our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act — namely, our Amendment will permit out-of-state holding companies to acquire banks in other states only to the degree that state laws expressly permit them.

102 Cong. Rec. 6858 (1956). See also, Id. at 6860; A-56.

In enacting the McFadden Act, 12 U.S.C. § 36(c), see A-43-44, in 1927, Congress relaxed federal restrictions on branch banking by national banks, but at the same time subjected them to the same branching restrictions imposed by the states on State banks. Congress

intended "to leave the question of desirability of branch banking up to the states," First National Bank v. Walker Bank & Trust Co., 385 U.S. 252, 258 (1966), and to permit branch banking by national banks " 'and only those states the laws of which permit branch banking, and only to the extent that the state laws permit branching banking.' " Id. at 259, (quoting Senator Glass, 76 Cong. Rec. 2511 (1933)). To Senator Douglas, the Douglas Amendment would operate in a similar way.

Senator Payne, however, spoke only of allowing the state to control State banks, believing that control of national banks should be left exclusively to the federal government under the preemption doctrine.

In light of the conflicting legislative history of the Douglas Amendment's co-sponsors, an interpretative explanation from this Court is needed.

II.

THE SOUTH DAKOTA BANK ACQUISITION STATUTES ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. The Operation and Effect of the South Dakota Bank Acquisition Statutes on National Banks Raises Impor-

tant and Novel Questions of Statutory Interpretation.

ICBA asserted below that, even if the Douglas Amendment permits interstate acquisition of national banks, the Board exceeded its authority or abused its discretion in approving First City's application because the South Dakota bank acquisition statutes place impermissible restrictions on the operations of national banks acquired by out-of-state bank holding companies under the statutes. This claim, like ICBA's claim concerning the Douglas Amendment, is an issue of first impression. No court has ever construed the Board's authority under the BHCA to approve an acquisition of a national banking association where the state has conditioned the activities of a national banking association through "special purpose" legislation. Although the Board and the Comptroller have alluded to this issue in recent decisions, none of the decisions have ever been passed on by any state or federal court. The novelty of the issue alone, therefore, justifies review by the Court.

In addition, at least nine other states have enacted special purpose bank acquisition statutes which, in substance, mirror those found in South Dakota. See e.g., Del. Code Ann., Tit. 5, § 801 et seq. (Supp. 1986). Interpretation by the Court is necessary to provide direction not only to South Dakota and the nine other states which have adopted special purpose statutes, but also to the Board and the banking industry as a whole.

In addition, review is necessary to address the important concerns raised by the Court of Appeals re-

garding future application of South Dakota's special purpose statutes. The Court of Appeals observed that the special purpose statutes could offend federal banking law in future applications. 820 F.2d at 440. The Court went on to recognize that there was ample potential for state-federal conflicts under the terms of the special purpose statutes. Id. In doing so, the Court noted that the statutes rendered acquisitions "subject to such conditions as the Commission deems necessary" and expressed concern about the lack of any explicit statutory limitation on the Commission's conditioning authority. Id. Interpretive construction and elucidation from this Court is therefore crucial so that states like South Dakota with special purpose statutes as well as the Board and the banking industry in general, may know what conditions may be placed on a bank holding company's interstate acquisition of a nationally chartered bank.

Moveover, interpretation is needed to address the concern, on the part of both the Board and the Court of Appeals, about the trend toward the establishment of limited service banks controlled by out-of-state bank holding companies. See A-40-41; 820 F.2d at 440. To the Board and the Court, such a trend raises serious public policy questions. By the Board's and Court's own comments, it is clear that the flag is raised not only in South Dakota and other states having special purpose statutes in place, but in the federal government as well, that banking laws need to be overhauled to conform with federal law. This Court can define the boundaries for making these changes and is called upon, in this case, to do so through a Writ of Certiorari.

2. The Compatibility of the South Dakota Bank Acquisition Statutes with National Banking Law Raises Important And Novel Questions of Federal Law.

Nationally chartered banks are federal institutions and as such, are subject to the paramount authority of federal law. Congress, however, may confer power upon states to regulate national banks, see Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980) and Northeast Bancorp. Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985), so long as the state regulation does not expressly conflict with the laws of the United States and either frustrate the purpose of federal law or impair the efficiency of national banks to discharge the duties, for the performance of which they were created. See Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896). In the instant case, at least two important questions of statutory interpretation are raised by the unique interplay between the South Dakota bank acquisition statutes, the Douglas Amendment and other national banking laws. First, whether the Douglas Amendment confers upon the states the authority to limit the activities of national banks acquired by out-of-state holding companies. Second, if the amendment does not confer such authority, whether the South Dakota statutes conflict with and frustrate federal banking law.

These questions in turn raise an additional predicate question dealt with by both the Board and the Court of Appeals, namely, whether Congress, as opposed to South Dakota, restricts the operations of a national bank acquired under the South Dakota bank acquisi-

tion statutes. According to the Board, the South Dakota statutes directly impose no restrictions on national banks acquired by out-of-state holding companies despite the statutes' language purporting to do so; the conditions outlined by the South Dakota statutes are transmitted to the national banks by the Douglas Amendment through the mechanism of the amendment's parallel lifting of the interstate expansion ban. Essentially, the Board opined that these conditions, as imposed on national banks, are matters of federal law and as such, raise no potential conflict between state and federal law. The Court of Appeals, however, rejected the notion that it is Congress, through silent and blanket assimilation in the Douglas Amendment, that has imposed the restrictions on the operations of acquired national banks. See 820 F.2d at 436-37. Yet whether it is Congress or South Dakota which restricts national bank operations is a debatable question that only this Court can resolve.

The same holds true with respect to the question of whether Congress created, through the Douglas Amendment, the specific authority for South Dakota and other states to impose restrictions on national banks. ICBA asserted below that the BHCA neither allows nor authorizes a state to impose conditions on the activities of either an out-of-state bank holding company or, more particularly, a national banking institution acquired by a bank holding company. As authority for its argument, ICBA cited Lewis, where this Court observed that "it is doubtful that [the Douglas Amendment] authorizes state restrictions of any nature on

bank holding company activities." 447 U.S. at 47. This statement, at a minimum, creates uncertainty as to the ability of states to utilize the BHCA to eliminate the activities of a national bank acquired by an out-of-state bank holding company. It is therefore imperative that the Court clarify its statement and resolve the question at hand. For this reason, review is warranted.

Review is also warranted to resolve the question of whether the South Dakota bank acquisition statutes conflict with and frustrate federal banking laws. ICBA argued below that by restricting the acquired national bank to a single office, the South Dakota statutes create a per se prohibition on branch banking in violation of the McFadden Act. ICBA also argued that by requiring that the acquired national bank not compete for customers with existing local banks, the South Dakota statutes constrict the operation of an otherwise fully operational national bank in contravention of its charter mandate and national banking laws. Specifically, ICBA asserted that such a prohibition on competition frustrates the purpose of national banking legislation and impairs the efficiency and ability of the acquired national bank to discharge its federal banking duties. The Court of Appeals, however, dismissed both of these arguments. Nonetheless, whether the South Dakota statutes and other special bank acquisition statutes run contrary to or frustrate national banking laws is a question of vital significance to federal and state banking authorities and to the banking industry as well. Review by this Court, therefore, is urged to resolve this important question.

CONCLUSION

For the foregoing reasons, Independent Community Bankers Association of South Dakota, Inc. respectfully requests that a Writ of Certiorari issue to review the Judgment of the District of Columbia Court of Appeals.

Dated this 2nd day of September, 1987.

Respectfully submitted,

SCHMIDT, SCHROYER, COLWILL & BARNETT, P.C.

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APPENDICES

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1496

INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC., PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

FIRST CITY BANCORPORATION OF TEXAS, INC., INTERVENOR

Petition for Review of an Order of the Board of Governors of the Federal Reserve System

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Argued September 8, 1986

Decided June 5, 1987

Ronald G. Schmidt for petitioner. *Leonard J. Ruben* also entered an appearance for petitioner.

James E. Scott, Attorney, Board of Governors of the Federal Reserve System, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice, *Richard M. Ashton*, Associate General Counsel and *Robert D. McGillicuddy*, Attorney, Board of Gov-

ernors of the Federal Reserve System were on the brief for respondent.

Platt W. Davis, III, with whom *Cathy A. Lewis* and *James R. Layton* were on the brief for intervenor.

Before: WALD, *Chief Judge,* MIKVA, *Circuit Judge,* and LEIGHTON,* *Senior District Judge.*

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge:* Independent Community Bankers Association of South Dakota, Inc. ("ICBA") is a trade association representing chartered national and state banks located in South Dakota. It petitions this court to set aside an order of respondent, the Board of Governors of the Federal Reserve System (the "Board"), approving the acquisition of a newly chartered national bank located in South Dakota by First City Bancorporation of Texas, Inc. ("First City"). First City is a Texas corporation and bank holding company that conducts its activities primarily in Texas. It organized and acquired the new national bank to enable it to transfer its consumer credit card business to South Dakota. The fundamental question before this court is whether federal banking law, particularly the Bank Holding Company Act of 1956 ("BHCA"), 12 U.S.C. § 1841 *et seq.* (1982), allows a bank holding company to acquire and operate a limited service national bank located outside the company's home state. Petitioner argues that it does not on two grounds. First, petitioner contends that the BHCA absolutely prohibits the Board from approving the acquisition of a national bank by an out-of-state bank holding

company. Petitioner argues, alternatively, that even if the Board may approve such acquisitions generally, it is precluded from approving First City's proposed acquisition because the South Dakota statute authorizing the acquisition places restrictions on the operation of the acquired bank in contravention of federal law governing national banks. We reject petitioner's arguments and deny the petition.

* Of the United State District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. 294(d).

I. BACKGROUND

In enacting the BHCA, Congress intended, among other things, to prevent overconcentration of national financial resources and possible abuses related to control of commercial credit. *See Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 684 (1986). To these ends, Congress vested the Board with regulatory authority over the acquisition of state and national banks by bank holding companies. The BHCA defines a bank as any institution organized under state or federal law which "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c). A bank holding company is defined as any corporation, partnership, business trust, association, or similar organization that owns or controls a bank or another bank holding company, 12 U.S.C. §§ 1841(a)(1), (b). Under section 3 of the BHCA, a bank holding com-

pany must obtain approval of the Board before acquiring another bank or substantially all of the assets of another bank. 12 U.S.C. § 1842. Section 3(c) specifies criteria to be considered by the Board in determining whether to grant approval of a proposed acquisition. 12 U.S.C. § 1842(c).

To meet its goals, Congress also chose to rely in part on state regulation of the banking industry. *See Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 511 F.2d 1288, 1291 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975). In section 7 of the BHCA, Congress reserved to each state all powers and jurisdiction in effect before the statute's enactment. *See* 12 U.S.C. § 1846. In addition, and of greater importance to this case, section 3(d) of the BHCA, known as the "Douglas Amendment," prohibits the Board from approving an application of a bank holding company to acquire any additional bank located outside of the state in which the bank holding company principally conducts its operations unless the state specifically authorizes the acquisition by an out-of-state bank holding company of a state bank located within the state's borders. *See* 12 U.S.C. § 1842(d). Prior to 1956, bank holding companies were permitted to own banks across state lines. Congress, in enacting the Douglas Amendment, expressed its desire to allow each state to choose for itself whether to open its borders to out-of-state banks. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980).

For approximately sixteen years, no state enacted legislation lifting the Douglas Amendment's ban on interstate bank holding company expansion. Beginning

in 1972, several states passed statutes permitting interstate bank acquisitions in limited circumstances or for specialized purposes. At present, twenty-eight states and the District of Columbia have adopted some type of "Douglas Amendment" statute. For example, several states have passed "grandfathering" legislation permitting expansion only of existing in-state banking operations by out-of-state bank holding companies, *See, e.g., Iowa Independent Bankers, supra* (sustaining Board approval of two interstate acquisitions under Iowa's grandfathering statute). Another type of statute authorizes out-of-state purchasers to acquire failing local banks. *See, e.g.*, Wash. Rev. Code § 30.04.230(4)(a) (Supp. 1985). By far the most popular kind of Douglas Amendment statute permits the acquisition of in-state banks by out-of-state holding companies located within a defined geographic region, but only on a reciprocal basis. The Supreme Court recently held that the Massachusetts and Connecticut reciprocal acquisition statutes are "of the kind contemplated by the Douglas Amendment to lift its bar against interstate acquisition." *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 173 (1985). The least common kind of statute permits "unrestricted" entry by out-of-state bank holding companies. Finally, ten states have enacted so-called "special purpose" statutes such as the South Dakota statute at issue in this case. Generally, this kind of legislation permits out-of-state organizations to set up in-state banks that do not compete with locally controlled full-service banks. *See id.* at 464 (noting that Delaware has adopted a special purpose statute).

In 1980, South Dakota enacted legislation designed to permit interstate bank acquisitions. In relevant part, South Dakota's banking law permits out-of-state bank holding companies to acquire "all or substantially all of the shares of a single new bank which is established under the laws of this state . . . and a single new national bank which is to be located in this state." S.D. Codified Laws Ann. § 51-16-40(a) (Supp. 1986). The statute limits the operation of such acquired banks to a single banking office. It also requires that the office "be operated in a manner and at a location which is not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state." *Id.* § 51-16-41. In addition, the statute makes all such interstate bank acquisitions subject to the approval of the South Dakota Banking Commission (the "Commission") and to any conditions that the Commission deems necessary. *Id.* § 51-16-42.

On May 3, 1984, First City submitted a proposal to the Commission to acquire a new nationally chartered bank to be located in Sioux Falls and designed to engage primarily in offering bank credit card services to customers in states other than South Dakota. Petitioner appeared before the Commission in opposition to the proposal. The Commission authorized the proposed acquisition, subject to the conditions prescribed in the South Dakota statute, and rendered its final approval contingent on approval by the Comptroller of the Currency (the "Comptroller") and the Board. Shortly thereafter, the Comptroller granted preliminary approval for the requested national bank charter, thereby clearing the way for the final steps in organiz-

ing the bank. First City then applied to the Board under section 3(a)(3) of the BHCA to acquire all of the voting shares of the newly chartered national bank.

Petitioner intervened in the proceedings before the Board, opposing First City's application. ICBA contended that the Board's approval of First City's application would violate the Douglas Amendment. According to ICBA, the Amendment limits the acquisition of banks by out-of-state bank holding companies solely to state chartered banks and bars the interstate acquisition of national banks. Petitioner argued, alternatively, that even if the Douglas Amendment allows states to permit the acquisition of national banks, application of the South Dakota statute to national banks is unlawful. ICBA asserted that the statute offends federal banking law by imposing conditions and restrictions on the activities of the acquired national bank.

By order dated July 12, 1985, the Board approved First City's application. The Board observed that the prohibitions of the Douglas Amendment can be lifted if the proposed interstate acquisition is specifically authorized by a statute of the state in which the target bank is located. The Board then noted that South Dakota law permits an out-of-state bank holding company to acquire a single *de novo* bank, subject to certain conditions. The Board determined that First City's proposed acquisition conformed to the statute's requirements and that the South Dakota statute explicitly authorized the acquisition, as required by the Douglas Amendment.

The Board then addressed ICBA's arguments. The Board dismissed ICBA's contention that the Douglas

Amendment does not authorize the states to permit out-of-state bank holding companies to acquire national banks. Calling upon the language and legislative history of the Amendment, the Board concluded that Congress intended the Douglas Amendment to apply to the interstate acquisition of any bank, whether national or state chartered. The Board also rejected ICBA's argument that the Board should deny the application because the restrictions placed by the South Dakota statute on the operations of national banks acquired under the statute conflict with national banking laws. The Board cited three reasons in support of this position. First, the Board determined that it was Congress, through the Douglas Amendment, which imposed conditions or restrictions on the operation of a national bank by an out-of-state bank holding company. Second, the Board determined that even if the limitations were viewed as state-imposed, Congress had authorized the states to impose such restrictions. Finally, relying on the Comptroller's prior approval of the national bank charter, the Board found that even absent specific congressional authorization, the Commission's conditions did not so restrict the operation of the proposed bank as to be incompatible with the framework of federal law.

Petitioner raises before this court the same two objections it raised before the Board. First City seeks to protect the decision in its favor by intervening on the Board's behalf.

II. DISCUSSION

A. *The Douglas Amendment*

Petitioner's Douglas Amendment claim presents a novel question of statutory construction: Does the Douglas Amendment authorize a state to permit an out-of-state bank holding company to acquire a *national* bank located within its borders? Although Congress enacted the Douglas Amendment more than thirty years ago, neither the Board nor any court has addressed this issue. During the past fifteen years, the Board has routinely approved the acquisition of national banks located in states that have enacted legislation under the Douglas Amendment authorizing the acquisition of in-state banks by out-of-state holding companies. *See, e.g. First Kentucky National Corp.*, 70 Fed. Res. Bull. 434 (1984); *BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983); *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982); *Citicorp*, 67 Fed. Res. Bull. 181 (1981). According to the Board, until this case, no party has contended that the Douglas Amendment limits interstate acquisition to state banks only.

The Douglas Amendment consists of two operative provisions. The first provision prohibits interstate bank holding company expansion generally. The second provision provides for the lifting of this ban under certain circumstances. The parties in this case do not dispute the scope and effect of the first provision, which states:

> no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly,

> any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company whichever is later[.]

12 U.S.C. § 1841(d)(1). By its plain language, this provision prohibits the Board from approving the acquisition by a bank holding company of any additional bank located outside the holding company's home state. The statutory definition of "bank" is functional, encompassing "institution[s] organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, [and] the Virgin Islands." 12 U.S.C. § 1841(c). *See supra* page 3. Thus, the Douglas Amendment's general prohibition clearly applies to acquisition of both state and national banks.

The dispute in this case centers on the scope and effect of the second provision of the Douglas Amendment. The provision states that the prohibition on interstate expansion contained in the first provision stands

> unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication.

12 U.S.C. § 1842(d). Both parties argue that this phrase is clear and unambiguous, but they glean drastically different meanings from it.

Petitioner reads the clause as carving out an exception applicable only to state banks. Under ICBA's reading, states may decide if they want out-of-state bank holding companies to do business within their borders, but if they opt for entry, they may authorize the acquisition of state chartered banks only. The Douglas Amendment retains its prohibition against the acquisition of national banks, even if a state statute expressly allows out-of-state bank holding companies to acquire nationally chartered banks located in the state.

The Board, on the other hand, reads the "unless" clause as triggering a complete suspension of the Douglas Amendment's prohibition against interstate expansion. Under the Board's interpretation, if a state lifts the prohibition on interstate bank acquisition with regard to state chartered banks within its borders, the Amendment itself lifts the prohibition with respect to national banks in a parallel fashion.

Our first and foremost obligation is to accord the Board its interpretive due. As the Supreme Court recently observed in *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 142 (1984), "[t]he Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference." Accordingly, we must defer to the Board's interpretation of the Douglas Amendment if it "provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Industry Association v. Board of Governors of the Federal Reserve System (SIA)*, 468 U.S. 207, 217 (1984).

The plain meaning of the Amendment in its entirety supports the Board's reading. By its terms, the first clause of the Amendment prohibits the interstate acquisition of both state and national banks. The second clause provides that the carte blanche prohibition stands *unless* the state permits the interstate acquisition of "such shares or assets of a State bank." The ordinary meaning of this language compels the conclusion that the entire prohibition lifts upon the state's authorization of interstate acquisition of a "State bank" located within its borders. The "unless" clause describes the triggering event that lifts the general prohibition with respect to all banks—"any additional bank"—located in the state. The Douglas Amendment need not specifically mention "national bank" in order to have this effect. Nor need the state specifically authorize the acquisition of national banks. In fact, the Douglas Amendment renders superfluous a state statute's authorization of interstate acquisitions of nationally chartered banks located in the state. Such state "authorization" would, in any event, be meaningless. Bank holding companies and nationally chartered banks are organized pursuant to federal law and the power of either to acquire or be acquired is governed by federal law.

Petitioner would read the "unless" clause as if it states "except that a state may authorize the acquisition of a State bank." This tortured reading is incompatible with the actual language of the statute; the literal words of the Amendment's second provision do not read as an exception.

The clarity of the language of the Douglas Amend-

ment makes resort to legislative history unnecessary and unavailing. *See Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980). ICBA insists that the legislative history of the BHCA supports its interpretation of the Douglas Amendment. Even if petitioner were correct, it could not overcome the plain meaning of the statute. Only in the most exceptional case, where there is "a clearly expressed legislative intention to the contrary," can the language of the statute be regarded as anything by conclusive, *North Dakota v. United States*, 460 U.S. 300, 312 (1983). *See United States v. Locke*, 471 U.S. 84, 95-96 (1985). In our view, nothing in the legislative history even remotely suggests a congressional intent contrary to Congress' chosen words in the Douglas Amendment.

The BHCA, as originally passed by the House of Representatives in 1955, banned all interstate acquisitions. *See* H. Rep. No. 609, 84th Cong., 1st Sess. (1955). The bill reported out by the Senate Committee on Banking and Currency permitted interstate bank acquisitions conditioned only on approval by the Board. *See* S. Rep. No. 1095, 84th Cong., 1st Sess. (1955). On the floor of the Senate, Senator Douglas of Illinois suggested his amendment to the BHCA as a compromise between the two positions. The Amendment's entire legislative history is confined to the Senate floor debate. In such instances, "the comments of individual legislators carry substantial weight." *Northwest Bancorp*, 472 U.S. at 169-70.

Neither of the two Senators on whom ICBA focuses expressed an understanding of the Amendment contrary to our reading of the statute. ICBA notes the re-

marks of Senator Payne, a supporter of the Amendment, referring to the drafters' intention to give state governments control over bank holding company expansion across state lines through acquisition of "State banks." *See* 102 Cong. Rec. 6862 (1956). It is difficult to discern whether Senator Payne had in mind state chartered banks or simply banks located within a given state. Senator Payne's statements seem more to express a general intent to preserve the states' role in regulating the growth of bank holding companies than to describe specific limitations on state regulation. Even if Senator Payne's comments were read to refer only to state chartered banks, there is no suggestion in his remarks that Congress intended to preclude interstate acquisition of national banks.

Petitioner's attempt to draw support from Senator Douglas is equally unavailing. In describing the effect of his amendment, Senator Douglas stated:

> Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States

102 Cong. Rec. at 6860. Senator Douglas's comments make no distinction between acquisitions of national and state chartered banks under the Amendment. Given that his remarks referred to a statute that defined "bank" as including both national and state banks, his reference to banks must ineluctably be understood as relating to both.

Senator Douglas made it clear that he was using the McFadden Act, 12 U.S.C. § 36 *et seq.* (1982), as the

model for his amendment:

> [W]hat our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act . . . .

102 Cong. Rec. 6860. The McFadden Act provides that a national bank located in a particular state may establish and operate new branches in the state to the same extent "authorized to state banks by the statute law of the state in question." 12 U.S.C. § 36(c)(2). Where a state statute allows state banks to branch, the McFadden Act bestows the same privilege on national banks located in that state. The McFadden Act gives to the states the opportunity to determine the ability of national banks in those states to branch through the mechanism of controlling state chartered bank branching. The overriding goal of the McFadden Act is to subject national and state chartered banks to the same rules governing expansion by branching and thereby to support the policy of competitive equality in the dual banking structure. *See First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 130-33 (1969).

In analogizing his Amendment to the McFadden Act, Senator Douglas expressed his intent that the Douglas Amendment operate similarly: state law would set the substantive rules by prescribing the interstate acquisition of state banks, whereas federal law would ensure equivalent treatment for national banks. This understanding comports with the Board's interpretation of the Amendment. Congress provided, by operation of the Douglas Amendment alone, that if a state permits interstate acquisition of its state char-

tered banks, then it also permits acquisition of national banks to the same extent. Congress hinged the lifting of the entire prohibition on the state's laws as to its state banks precisely because it did not want to rely on the states to provide equivalent treatment for national banks. As with the McFadden Act, federal law—the Douglas Amendment—ensures that equality. Congress was willing to allow states to prohibit the interstate acquisition of state chartered banks and nationally chartered banks located in the state, but Congress was unwilling to allow states to discriminate against banks by permitting the interstate acquisition of its own banks alone. The Douglas Amendment, as interpreted by the Board, thus serves the same competitive equality policy as the McFadden Act.

In contrast, petitioner's interpretation of the Douglas Amendment eliminates altogether the parallel treatment of state and national banks. Its reading of the Amendment makes only state banks eligible for acquisition by out-of-state holding companies; national banks are unable to be acquired similarly. In fact, petitioner's interpretation reduces the analogy between the Douglas Amendment and the McFadden Act to the bare fact that the state is the decision-maker. The plain language and the very legislative history relied on by petitioner evince congressional intent to structure a more meaningful way to carry forward the policies begun in the McFadden Act.

In sum, the Douglas Amendment permits the approval of an out-of-state bank holding company's acquisition of an in-state national bank if the state in which the national bank is located has authorized the inter-

state acquisition of local state chartered banks.

B. *The South Dakota Bank Acquisition Statute*

Petitioner also challenges the South Dakota bank acquisition statute. Petitioner argues that, even if the Douglas Amendment permits interstate acquisition of national banks, the Board exceeded its authority or abused its discretion in approving First City's application because the South Dakota statute places impermissible restrictions on the operations of national banks acquired by out-of-state bank holding companies under the statute. The South Dakota statute requires the acquired national bank to operate only a single office and to avoid competing for customers with existing local banks. The statute also authorizes the state Commission to impose any additional conditions it deems necessary.

Nationally chartered banks are federal institutions and, as such, are subject to the paramount authority of federal law. Congress, however, may confer power upon the states to regulate national banks. *See Lewis*, 447 U.S. at 44; *Northeast Bancorp.* 472 U.S. at 174. Even in the absence of such authorization, states may regulate the operations of national banks so long as the regulation is not repugnant to federal law. *See Davis v. Elmira Savings Bank*, 161 U.S. 275, 287 (1896). A state law limiting the operation of national banks is preempted by federal law and invalid under the Supremacy Clause of the Constitution only if the state law "expressly conflicts with the laws of the United States, and either frustrates the purpose of national legislation or impairs the efficiency of [national banks] to discharge the duties, for the performance of which

they were created." *Id.* at 283. Thus, petitioner's claim raises dual questions of statutory interpretation. We first must consider whether the Douglas Amendment confers upon the states the authority to limit the activities of national banks acquired by out-of-state holding companies. Second, if the Amendment does not confer such authority, we must consider whether the South Dakota statute conflicts with and frustrates federal banking law.

Before turning to these considerations, we address the Board's rejection of the premise of this inquiry. The Board argues that it is Congress and not South Dakota that restricts the operations of national banks acquired under the South Dakota statute. According to this argument, the South Dakota statute directly imposes no restrictions on national banks acquired by out-of-state bank holding companies, despite the statute's language purporting to do so; the conditions outlined by the South Dakota statute are transmitted to the national banks by the Douglas Amendment, through the mechanism of the Amendment's parallel lifting of the interstate expansion ban. Essentially, the Board asserts that these conditions, as imposed on national banks, are matters of federal law. Thus, the Board concludes that its approval of First City's application raises no potential conflict between state and federal laws.

Although the Board's argument has some initial appeal, that appeal fades upon consideration of the implications of the argument. At bottom, the Board contends that Congress incorporated subsequently adopted substantive state banking law into the Doug-

las Amendment. Congress clearly has the power to assimilate state law; it even may adopt subsequently enacted state statutes. *See e.g., United States v. Sharpnack*, 355 U.S. 286, 293-97 (1958). But state law may impose a myriad of restrictions on the contracts and dealings of state chartered banks; some such restrictions would in all likelihood conflict with existing federal laws governing bank holding companies and their subsidiary nationally chartered banks. To hold that Congress contemplated the adoption of subsequently enacted state banking legislation in the Douglas Amendment, therefore, is to decide that Congress sanctioned either direct conflict between coordinate federal statutes or nullification of the acts of Congress by subsequent and unknown state laws. Such decisions require an unequivocal congressional expression because they are repugnant to venerable rules of statutory construction frequently reaffirmed by the Supreme Court. Congress is presumed to intend to achieve a consistent body of federal law, and repeal of coordinate law by implication is strongly disfavored. *See. e.g., Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982); *Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 1262 (1986). We do not believe that Congress intended to adopt state law that would work a wholly unconsidered denunciation of positive federal law. The Supreme Court apparently agrees. Although neither case dealt with the particular issue at hand, in both *Lewis* and *Northeast Bancorp*, the Supreme Court viewed the statutes at issue as creatures of state law, establishing state-imposed reg-

ulations and raising potential federalism concerns. We therefore cannot agree that it is Congress, through silent and blanket assimilation in the Douglas Amendment, that has imposed the restrictions on the operations of First City's acquired national bank.

We turn, then, to the question of whether Congress has authorized the restrictions imposed by the South Dakota statute. Petitioner contends that the BHCA neither allows nor authorizes a state to impose conditions on the activities of either an out-of-state bank holding company or, more particularly, a national banking institution acquired by a bank holding company. ICBA argues that the Douglas Amendment provides only for an "all or nothing" approach: if a state permits interstate acquisition of national banks located within its borders, its permission must be unconditional. ICBA cites to dicta in *Lewis* in which the Supreme Court suggested that "it is doubtful that [the Douglas Amendment] authorizes state restrictions of any nature on bank holding company activities." 447 U.S. at 47. Petitioner argues that the Court thereby indicated that states may not utilize the BHCA to limit the activities of a national bank acquired by an out-of-state bank holding company. The dicta in *Lewis*, however, cannot be read so broadly. The Supreme Court did not purport to address this specific issue in *Lewis*. Lewis presented the question of whether the BHCA allowed states to prohibit out-of-state bank holding companies from acquiring in-state investment advisory companies. Nonbanking activities of holding companies are regulated separately under § 4 of the BHCA. The Court held that, whatever the power of the

states to regulate banking matters under the Douglas Amendment (§ 3 of the BHCA), the Amendment cannot be read to authorize state discrimination in the regulation of an out-of-state bank holding company's *nonbanking* activities. *Lewis*, 447 U.S. at 47. *Lewis*, therefore, does not resolve the issue before this court.

The Board interprets the lifting provisions of the Douglas Amendment to mean that Congress has authorized application of the South Dakota restrictions to national banks. Under the Board's statutory interpretation, the Douglas Amendment's "plenary grant" of authority to the states to lift the Amendment's prohibition on interstate acquisitions necessarily encompasses the authority to enact statutes imposing restrictions on the operations of national banks. The Board draws support for its interpretation from *Northeast Bancorp, supra*. In *Northeast Bancorp*, the Supreme Court held that the Douglas Amendment authorizes the states to grant entry to out-of-state bank holding companies on a limited or conditional basis. But the kind of conditional lifting in *Northeast Bancorp* differed significantly from that provided for in the South Dakota bank acquisition statute. In *Northeast Bancorp*, the Court considered two state statutes that allowed the acquisition of banks located in each state by bank holding companies located in another state if, and only if, the other state's laws contained reciprocal provisions. In addition, the reciprocity arrangement extended only to bank holding companies in states located within a defined geographical region. Unlike the South Dakota statute, these conditional and limited liftings of the Douglas Amendment prohibition

in no way restricted the actual banking practices of the acquired banks. Thus, we find no support for the Board's position in the Supreme Court's holding in *Northeast Bancorp.*

We can locate no grounds for declaring that the Douglas Amendment *authorizes* state regulation of the operations of national banks acquired pursuant to the state's "Douglas Amendment" statutes. Neither the Douglas Amendment nor its legislative history speaks to this question, and no court has broached the issue. The Board's notion and congressional authorization returns us to the nettlesome problem posed by the potential conflict between state-imposed conditions and federal banking law. If we find that Congress granted the states the authority to impose conditions on national banks, then the effect will be to give the states the authority to nullify federal banking laws and to regulate an increasing number of national banks in a manner that is repugnant to federal policies. In other words, the Douglas Amendment would operate as an implied statutory repeal of many important federal banking laws. As noted above, "[i]t is . . . a cardinal principal of statutory construction that repeals by implication are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). *See supra* page 16. Generally, courts will not find repeals by implication unless legislative intent to repeal is "clear and manifest." *Hansen*, 772 F.2d at 944 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Neither the language of the Amendment nor its legislative history indicates an intention to abrogate extant federal banking law governing bank holding companies and their sub-

sidiary nationally chartered banks. We therefore decline to hold that Congress created, through the Douglas Amendment, the specific authority for South Dakota to impose restrictions on national banks.

Lack of such specific congressional authorization does not mean that states have no power to regulate national banks. States have the same power and jurisdiction they possessed before the Douglas Amendment's enactment—the power to regulate national banks to the extent that such regulation does not conflict with or frustrate federal law. *See Davis*, 161 U.S. at 283. We reach then the heart of petitioner's objection: whether the South Dakota statute conflicts with federal banking legislation.

Petitioner suggests two ways in which it believes the statute is inconsistent with federal laws. First, ICBA argues that by restricting the acquired national bank to a single office, the statute creates a *per se* prohibition on branch banking in express violation of the McFadden Act. Petitioner misunderstands the McFadden Act's operation in this context. The McFadden Act permits national banks to branch in a state if and to the extent that the state law permits the establishment and operation of branches by state banks. South Dakota law imposes the same branching restrictions on state chartered banks acquired by out-of-state holding companies as it does on national banks similarly acquired. *See* S.D. Codified Laws Ann. § 51-16-41. Thus, the South Dakota statute maintains competitive equality between similarly situated state and national banks. The McFadden Act contemplates precisely this kind of equality. In fact, if the South Dakota statute did

not specifically impose the nonbranching (single office) limitation on the acquired national banks, the McFadden Act itself would act in such limitation, by virtue of the statute's single office limitation on acquired state banks.

Second, ICBA argues that by stipulating that the acquired national bank not compete for customers with existing local banks, the South Dakota statute constricts the operation of an otherwise fully operational national bank in contravention of its charter mandate. Petitioner contends that a national banking association is established to discharge all the duties enumerated in its enabling legislation and that there is no such institution as a "special purpose" national bank. ICBA asserts that the South Dakota statute's prohibition on competition frustrates the purpose of national banking legislation and impairs the efficiency and ability of the acquired national bank to discharge its federal banking statutory duties.

In rejecting petitioner's argument, the Board relied, in part, on the Comptroller's previous opinion in issuing a preliminary national bank charter for a bank in South Dakota organized by Citicorp, a bank holding company located outside South Dakota. Citicorp's application to acquire this new national bank, approved in 1981, was the first application processed under the South Dakota statute. Citicorp's principal stated purpose for organizing the new bank was to engage in consumer credit card services, although the bank holding company also intended to transfer other banking business to the new entity. *See Citicorp*, 67 Fed. Res. Bull. 181 (1981). In his *Citicorp* opinion, the Comptroller ad-

dressed the potential state-federal conflict posed by the South Dakota statute. The Comptroller concluded that he was "not prepared to conclude on the record before [him] that the South Dakota statutory scheme, on its face, so restricts the operations of the proposed bank as to be incompatible with the framework of federal law." Op. Compt. Curr., Nov. 19, 1980, at 11-12.

More specifically, the Comptroller addressed the arguments raised by petitioner here. The Comptroller noted that the grant of authority to national banks under the National Bank Act, 12 U.S.C. § 24 (1982), is permissive, rather than mandatory. He observed that an institution rarely contemplates engaging in the full range of permissible activities; many nationally chartered institutions concentrate on a few specific activities. Because "a national bank charter allows an institution to select from among the wide variety of permissible banking activities those activities which it will provide in its banking markets," the Comptroller held that "Citicorp's decision to cause its proposed subsidiary to operate as less than a 'full service bank,' so as to avoid conflict with the state statute, is a business decision which does not necessarily result in a course of action incompatible with the National Bank Act or other federal statutes." *Id.* at 12 n.8. The Comptroller further found that the South Dakota statutory restrictions presented no threat to the successful operation of the proposed bank, since they did not require the bank to operate in a manner that was unsafe or unsound.

The same reasoning applies to First City's proposed acquisition of its new national bank under the South Dakota statute. Like Citibank, First City proposed to

limit its subsidiary's activities principally to offering credit card services. Also like Citibank, First City proposed to provide retail and commercial deposit-taking, lending, and checking services to the local community to the extent permitted by the statute and to offer additional services not already provided, including the provision of overline banking services to other banks in South Dakota. First City's decision to relocate its consumer credit card business to South Dakota, like Citibank's similar decision, is a business decision motivated, no doubt, by the absence in South Dakota of usury ceilings on consumer loan receivables. In this context, the Board reasonably placed significant reliance on the Comptroller's *Citibank* opinion in determining that First City's decision to limit its activities (in part, to comply with the South Dakota statute) is compatible with the National Bank Act's grant of greater powers to national banks.

By arguing that the South Dakota statute frustrates the purposes of the national banking laws, in effect, ICBA challenges the Comptroller's issuance of First City's national bank charter which complies with the state statute's restrictions. In examining petitioner's argument, we must defer to the reasonable determinations of the agency charged with the administration of those acts of Congress. The primary supervisor of national banks and the agency charged with enforcement of the National Bank Act is the Office of the Comptroller of the Currency. Congress has conferred broad statutory powers on the Comptroller to enable him to perform his supervisory and regulatory functions. "[W]e cannot come lightly to the conclusion that the Comp-

troller has authorized activity that violates the banking laws." *Investment Company Institute v. Camp*, 401 U.S. 617, 626 (1971). In addition to his issuance of Citibank's and First City's South Dakota national bank charters, the Comptroller has repeatedly chartered national "credit card" banks for acquisition under state statutes similar to South Dakota's and either implicitly or expressly found that these statutes do not violate national banking law. *See, e.g., First Kentucky National Corp.*, 70 Fed. Res. Bull. 434 (1984); *Provident National Corp.*, 68 Fed. Res. Bull. 260 (1982).

We have no doubt but that the Comptroller's construction and application of the National Bank Act in this context is reasonable. There is nothing in the language or legislative history of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory. Restriction of a national bank's activities to less than the full scope of statutory authority conflicts with the purposes of the Act only if it undermines the safety and soundness of the bank or interferes with the bank's ability to fulfill its statutory obligations. That judgment requires consideration of the particular legal and business circumstances of the individual banks—a judgment within the particular expertise of the Comptroller and reserved to his chartering authority. We hold, therefore, that the Board correctly determined that the South Dakota statute, as applied to First City, does not violate federal banking legislation. Consequently, we find that the Board's approval of First City's application was not invalid.

Our holding today should not be understood as a

wholesale endorsement of the South Dakota statute. We do not conclude that the statute will not offend federal banking law in future applications. We hold only that as presently interpreted, administered and applied, it does not conflict with the National Bank Act and other federal banking statutes. We recognize that there is ample potential for state-federal conflict under the terms of the statute. The statute specifically renders acquisitions "subject to such conditions as the [South Dakota Banking C]ommission deems necessary." S.D. Codified Laws Ann. § 51-16-42. There is no express statutory limitation on the Commission's conditioning authority. As yet, the Commission has not imposed additional conditions on out-of-state bank holding companies acquiring nationally chartered banks in South Dakota under the statute. No additional conditions were placed on First City. Any condition placed on a bank holding company that in any way precluded or interfered with the ability of the company's subsidiary to carry out its obligations under federal banking law would be impermissible. We assume that the Comptroller and the Board would so hold in any review of such bank holding company's activities.

III. CONCLUSION

We do not doubt that the trend toward establishment of limited service banks controlled by out-of-state bank holding companies raises public policy questions. The Board is not insensitive to these considerations. In approving First City's application, the Board expressed its concern regarding state statutes that, like

the South Dakota statute, permit the entry of out-of-state bank holding companies in order to shift jobs and revenue from other states, while limiting the in-state activities of banks owned by out-of-state companies so as to avoid competition with in-state banking organizations. The Board cautioned that proliferation of these statutes can only result in a serious impairment of local and national banking standards. But the South Dakota statute is not unlawful and pursuant to the Douglas Amendment, the Board was constrained to approve the acquisition authorized by the statute. The Douglas Amendment may be imperfect in this regard. Up until now, however, Congress has provided for the regulation of bank holding companies through the BHCA. "If the [Act] falls short of providing safeguards desireable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address." *Dimension Financial*, 106 S. Ct. at 689.

The Douglas Amendment makes clear on its face the congressional design for parity of treatment between interstate acquisition of state banks and national banks. The Board's approval of First City's acquisition was consonant with that design. Accordingly, we deny ICBA's petition for review of the Board's approval of First City's application for acquisition of a new nationally chartered bank to be located in South Dakota.

It is so ordered.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1496 September Term, 1986

Independent Community Bankers Association of South Dakota, Inc.,
Petitioner

v.

Board of Governors of the Federal Reserve System,
Respondent

First City Bancorporation of Texas, Inc.,
Intervenor

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Before: WALD, Chief Judge, MIKVA, Circuit Judge, and LEIGHTON, *Senior District Judge.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Board of Governors of the Federal Reserve System, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the petition for review is hereby denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

George A. Fisher
Clerk

Date: June 5, 1987

Opinion for the Court filed by Circuit Judge Mikva.

*Of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX C

FEDERAL RESERVE SYSTEM

First City Bancorporation of Texas, Inc.
Houston, Texas

Order Approving Acquisition of a Bank

First City Bancorporation of Texas, Inc., Houston, Texas, a bank holding company within the meaning of the Bank Holding Company Act ("Act"), has applied for the Board's approval under section 3(a)(3) of the Act (12 U.S.C. § 1842(a)(3)) to acquire all of the voting shares of First City Bank-Sioux Falls, N.A., Sioux Falls, South Dakota ("Bank"), a proposed new bank.

Notice of the application, affording interested persons an opportunity to submit comments, has been given in accordance with section 3(b) of the Act. The time for filing comments has expired, and the Board has considered the application and all comments received, including the comments of the Independent Community Bankers Association of South Dakota, Inc., in light of the factors set forth in section 3(c) of the Act (12 U.S.C § 1842(c)).

Applicant, with consolidated assets of $17.3 billion,[1] is the 24th largest commercial banking organization in the nation. It operates 63 banking subsidiaries in Texas and is the fourth largest commercial banking organization in the state, with total domestic deposits of approximately $12 billion. Applicant also engages through subsidiaries in a variety of nonbanking activi-

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[1] Banking data are as of December 31, 1984.

ties.

Bank is a newly established national bank formed to engage primarily in offering bank credit card services to customers in Texas, Louisiana, Arkansas, Oklahoma, Colorado, and New Mexico. Upon consummation of the proposed transaction, Applicant would transfer its existing credit card operations, now conducted through First City National Bank of Houston ("FCNB"), to Bank.[2]

Section 3(d) of the Bank Holding Company Act (12 U.S.C. § 1842(d)) (the Douglas Amendment) prohibits the Board from approving any application by a bank holding company to acquire any bank located outside the state in which the operations of the bank holding company's banking subsidiaries are principally conducted unless the acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." South Dakota law permits an out-of-state bank holding company to acquire a single de novo national bank and a single de novo state bank subject to the conditions that each such bank have only a single office and that it be operated in a manner and at a location that is "not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state."[3]

In addition, interstate acquisitions under the South Dakota statute are subject to approval by the South

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[2] Applicant has stated that it would transfer approximately $500 million of credit card receivables from FCNB to Bank.

[3] S.D. Codified Laws Ann. § 51-16-40, 51-16-41 (Supp. 1984).

Dakota Banking Commission.[4] In acting on an application under the statute, the Banking Commission may consider the economic advantages to the state of the proposed acquisition, whether the acquisition may result in undue concentration of resources or substantial lessening of competition in South Dakota, whether the convenience and benefits to the public outweigh any adverse competitive effects, and whether the proposed de novo bank is likely by its location to attract business from the general public to the substantial detriment of existing banks. On July 25, 1984, the South Dakota Banking Commission approved Applicant's formation and acquisition of Bank, concluding that Applicant's proposal met the requirements for approval under the South Dakota statute. Based on the foregoing, the Board has determined, as required by section 3(d) of the Act, that the proposed acquisition conforms to South Dakota law and is specifically authorized by the statute laws of South Dakota.

Bank will engage primarily in offering consumer credit card services in the regional market of Texas, Louisiana, Arkansas, Oklahoma, Colorado, and New Mexico. Since the establishment of Bank represents an internal reorganization of Applicant's credit card operations, the proposal will not alter the structure of the market for bank credit card services.

Bank will also compete in the Sioux Falls, South Dakota, banking market,[5] where it will provide retail and

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[4] S.D. Codified Laws § 51-16-42.

[5] The Sioux Falls market includes Moody, McCook, Minnehaha, Turner, and Lincoln Counties and parts of Clay and Union Counties in South Dakota, as well as Clay County in Minnesota.

commercial deposit-taking, lending, and checking services to the local community to the extent allowed by South Dakota law. Because of the limitations imposed on Bank's operations by South Dakota law, Bank will not generally compete directly with commerical banks in South Dakota; however, Bank will engage de novo in offering certain banking services, including the provision of overline banking services to other banks in South Dakota. To the extent that Bank will offer banking services de novo, the effect of this proposal will be procompetitive. Accordingly, the Board concludes that the competitive effects of this proposal are consistent with approval.

In evaluating this application, the Board has considered the financial and managerial resources of Applicant and the proposal's effect on these resources. The proposed acquisition represents a relocation of existing activities that would provide Applicant with increased income opportunities and have minimal effect on Applicant's primary and total capital ratios, which would remain above the minimum levels specified for bank holding companies under the Board's guidelines. In this context, the Board concludes that approval of the application is consistent with financial and managerial considerations. Factors relating to the convenience and needs of the community to be served also are consistent with approval.

The Board has received comments in opposition to this proposal, as well as a request for a hearing, from the Independent Community Bankers Association of South Dakota, Inc. ("Protestant"). The Protestant first argues that the Douglas Amendment to the Bank Hold-

ing Company Act does not authorize the states to permit out-of-state bank holding companies to acquire national banks. The Protestant bases this argument on the state authorization clause of the Douglas Amendment, which reads: "unless the acquisition of . . . a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located . . . ." 12 U.S.C. § 1842(d). On the basis of this clause and the absence of any express mention of national banks in the Douglas Amendment, the Protestant asserts that Senator Douglas "deliberately chose" to limit section 3(d) to acquisition of state banks.

Contrary to the Protestant's assertions, however, the Douglas Amendment applies to the interstate acquisition of any bank, national or state-chartered: its initial clause prohibits Federal Reserve Board approval of a bank holding company's acquisition of "voting shares of . . . any additional bank" (emphasis added) in another state, while the following clause permits that state to authorize such an acquisition.[6]

In a conscious attempt to parallel the McFadden Act (12 U.S.C. § 36(c)), on which it was based,[7] the Douglas

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[6] Senator Douglas' statements on the Senate floor indicate that he did not intend the Amendment's authorization to the states to be limited to state banks. For example, in describing the effect of his Amendment, Senator Douglas stated that it "would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State bank holding companies were specifically permitted by law in such States." 102 Cong. Rec. 6860 (1956).

[7] See Northeast Bancorp. Inc. v. Board of Governors of the Feder-

Amendment permits the states to lift the Amendment's flat prohibition on the acquisition of state banks by out-of-state bank holding companies and ties the degree to which bank holding companies can make interstate acquisitions of national banks to state authorization for interstate acquisitions of state banks. Clearly the intent of the Douglas Amendment, consistent with the policy of the McFadden Act, was to maintain competitve equality by allowing the acquisition of any similarly situated bank—whether national of state-chartered—on an equal basis. Thus, it appears to have been Senator Douglas' intent that, when the flat prohibition on interstate bank acquisitions is lifted by a state with respect to state banks, the Douglas Amendment itself lifts the prohibition, to the same degree, with respect to national banks. The Board concludes that the Douglas Amendment was not intended to allow only state-chartered banks to be acquired by out-of-state bank holding companies.

The Protestant also argues that the Board should deny this application in light of the "unauthorized restriction" placed by the South Dakota statute on the operations of national banks acquired under the statute. Specifically, the Protestant alleges that the statu-

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(Footnote continued)

al Reserve System, 53 U.S.L.W. 4699, 4702 (1985). In debate on his amendment, Senator Douglas, stated:

> [W]hat our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them.

102 Cong. Rec. 6858 (1956).

tory restrictions, such as those which limit Bank to a single office and require operation of that office in a manner and at a location so as to avoid attracting local customers, impose burdens on national banks that conflict with national banking laws. The Protestant argues, therefore, that the Board should not approve an application under such a restrictive state statute.

The Board finds no merit in the Protestant's position because, as stated above, it is Congress through the Douglas Amendment that imposes the conditions or restrictions on the operation of a national bank by an out-of-state bank holding company, or, at a minimum, it is Congress that authorizes the states to impose such restrictions. Where, as here, such restrictions are within the scope of those authorized by Congress,[8] they cannot be said to impose unauthorized burdens that conflict with the national banking laws.

Moreover, the restrictions are not so burdensome as to conflict with federal banking laws. The Comptroller of the Currency, the primary supervisor of national banks and the agency charged with interpretation and enforcement of the National Bank Act, reviewed the restrictions imposed by South Dakota in the course of issuing a preliminary national bank charter for a bank in South Dakota to Citicorp, New York, New York. In an opinion issued November 11, 1980, the Comptroller held that the South Dakota statute did not "so restrict the operations of the proposed bank as to be incompatible with the framework of federal law." Based upon the facts in the record and for the reasons stated, the

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[8] See Northeast Bancorp, 53, U.S.L.W. at 4702-4703 (1985).

Board finds the Protestant does not present adequate reasons to deny this application.

In addition, the Protestant has requested a hearing with respect to the legal and public policy issues raised by this proposal. The Board, however, has determined that there are no material factual issues in dispute that would warrant a hearing on this application. Accordingly, the Protestant's hearing request is denied.

While it has decided to approve this application, the Board wishes to reiterate the concerns it has expressed in previous orders[9] about the proliferation of statutes that, like South Dakota's, permit the entry of out-of-state bank holding companies in order to shift jobs and revenue from other states, while limiting the in-state activities of banks owned by out-of-state holding companies so as to avoid competition with in-state banking organizations. These statutes do not appear to be based on appropriate public policy considerations for assuring a stable and sound banking system locally and nationwide, and the end result of their adoption by other states can only be serious impairment of banking standards and no net gains in jobs or revenues because of the proliferation.

Based on the foregoing and other facts of record, the application is approved for the reasons summarized above. The transaction shall not be consummated before the thirtieth calendar day following the effective date of this Order, or later than three months after the effective date of this Order, and Bank shall be

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[9] See Citicorp, 71 Federal Reserve Bulletin 101 (1985); MCorp, 71 Federal Reserve Bulletin _____ (Board Order dated June 24, 1985).

opened for business not later than six months after the effective date of this Order. The latter two periods may be extended for good cause by the Board or by the Federal Reserve Bank of Dallas, acting pursuant to delegated authority.

By order of the Board of Governors,[10] effective July 12, 1985.

(signed) James McAfee

James McAffee
Associate Secretary of the Board

[SEAL]

[10] Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Rice, Gramley, and Seger.

APPENDIX D

12 U.S.C. § 36

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirement of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing check and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city,

town, or village in which it is situated unless it has a combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(h) The words "state bank," "state banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of state laws.

12 U.S.C. § 1841

(a)(1) Except as provided in paragraph (5) of this subsection, "bank holding company" means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act.

(a)(5) Notwithstanding any other provision of this subsection—

(A) No bank and no company owning or controlling voting shares of a bank is a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section. For the purpose of the preceding sentence, bank shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring bank or company has sole discretionary au-

thority to exercise voting rights with respect thereto; except that this limitation is applicable in the case of a bank or company acquiring such shares prior to the date of enactment of the Bank Holding Company Act Amendments of 1970 [enacted Dec. 31, 1970] only if the bank or company has the right consistent with its obligations under the instrument, agreement, or other arrangement establishing the fiduciary relationship to divest itself of such voting rights and fails to exercise that right to divest within a reasonable period not to exceed one year after the date of enactment of the Bank Holding Company Act Amendments of 1970 [enacted Dec. 31, 1970].

(B) No company is a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis.

(C) No company formed for the sole purpose of participating in a proxy solicitation is a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(D) No company is a bank holding company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The Board is authorized upon application by a company to extend, from time to time for not more than one year at a time, the

two-year period referred to herein for disposing of any shares acquired by a company in the regular course of securing or collecting a debt previously contracted in good faith, if, in the Board's judgment, such an extension would not be detrimental to the public interest, but no such extension shall in the aggregate exceed three years.

(E) No company is a bank holding company by virtue of its ownership or control of any State chartered bank or trust company which is wholly owned by thrift institutions and which restricts itself to the acceptance of deposits from thrift institutions, deposits arising out of the corporate business of its owners, and deposits of public moneys.

(F) No trust company or mutual savings bank which is an insured bank under the Federal Deposit Insurance Act is a bank holding company by virtue of its direct or indirect ownership or control of one bank located in the same State, if (i) such ownership or control existed on the date of enactment of the Bank Holding Company Act Amendments of 1970 [enacted Dec. 31, 1970] and is specifically authorized by applicable State law, and (ii) the trust company or mutual savings bank does not after that date acquire an interest in any company that, together with any other interest it holds in that company, will exceed 5 per centum of any class of the voting shares of that company, except that this limitation shall not be applicable to investments of the trust company or mutual savings bank, direct and indirect, which are

otherwise in accordance with the limitations applicable to national banks under section 5136 of the Revised Statutes (12 USC 24) [12 USCS § 24].

(b) "Company" means any corporation [,] partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State. "Company covered in 1970" means a company which becomes a bank holding company as a result of the enactment of the Bank Holding Company Act Amendments of 1970 and which would have been a bank holding company on June 30, 1968, if those amendments had been enacted on that date.

(c) "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization

which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia. The term "bank" also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively in providing services for other depository institutions and their officers, directors, and employees.

12 U.S.C. § 1842

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 USCS § 1823(f)]) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State

in which such bank is located, by language to that effect not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1848.

Any party aggrieved by an order of the Board under this Act may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

APPENDIX E

South Dakota Bank Acquisition Statutes

51-16-40. Acquisition of shares of bank — Out-of-state bank holding company — Corporation other than bank holding company. Subject to the provisions of this chapter and to the approval of the banking commission, a bank holding company, as defined in the Bank Holding Company Act of 1956, as amended, 12 U.S.C. Sec. 1841, et seq., the principal place of business of whose banking subsidiaries is located outside the state,

(a) May acquire all or substantially all of the shares of a single new bank which is established under the laws of this state and which has minimum total capital of five million dollars and a single new national bank which is to be located in this state and which has minimum total capital of five million dollars, and

(b) May acquire all or substantially all of the shares of a single existing bank which is established under the laws of this state.

The acquisition of any bank by a corporation that is not a bank holding company is subject to the approval of the state banking commission pursuant to § 51-16-42.

Source: SL 1980, ch 331. § 1; 1983 ch 356, § 2.

51-16-41. Bank acquired by holding company — Limitation to single banking office — Insurance business restricted. Any bank the shares of which are acquired under the authority of subdivision (a) of § 51-16-40 shall be limited to a single banking office and such bank may not acquire, establish, share or maintain any additional banking office or remote service unit

whether by merger, consolidation or otherwise. Such In the case of a new bank, the shares of which are acquired under authority of subdivision (a) of § 51-16-40, such single banking office shall be operated in a manner and at a location which is not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state. Any bank, the shares of which are acquired under the authority of subdivision (b) of § 51-16-40, shall be operated in such a manner as not to acquire, establish, share or maintain any additional banking offices or remote service units by merger, consolidation or otherwise.

If a bank acquired pursuant to § 51-16-40 engages in the insurance business it shall conduct its insurance business in this state in a manner likely to not attract business from the general public to the substantial detriment of insurance companies, insurance brokers or insurance agents to the extent of their business in the state. No bank, as a prerequisite of making a loan, shall require the borrower to purchase insurance from the bank. Further, such insurance business shall be subject to the same laws and regulations of this state, and the application thereof by the division of insurance, as are applicable to the operations of insurance companies which are unaffiliated with banks.

Source: SL 1980, ch. 331, § 1; 1983, ch. 356, § 3.

51-16-42. Approval of commission required — Factors considered — Conditions — Fee. Any acquisition under § 51-16-40 must be approved by the banking commission. In considering an application for approval, the banking commission may consider the following

factors:

(1) Whether the convenience and benefit to the public outweighs any adverse competitive effects;

(2) Whether such acquisition may result in undue concentration of resources or substantial lessening of competition;

(3) Whether, in the case of a bank, the shares of which are acquired under the authority of subdivision (a) of § 51-16-40, the location or proposed location of the banking office of the bank to be acquired is likely to attract the general public to the substantial detriment of existing banks;

(4) Whether the economic advantages to the state, in terms of employment and capital investment, are adequate to permit approval of the application.

Any approval granted to a bank holding company by the commission shall be subject to such conditions as the commission deems necessary, and to the commission's continuing authority to ascertain the bank holding company's compliance with the provisions of this section and the conditions of approval. There is imposed a fee of fifty thousand dollars upon the filing of an application of a bank holding company to acquire or form a bank pursuant to the authority of §§ 51-16-40 and 51-16-41 for the purpose of engaging in facets of the insurance business, which fee is to be deposited in the general fund.

Source: SL 1980, ch. 331, § 1; 1983, ch. 356, § 4.

51-16-43. State court jurisdiction — Director as agent for service of process. Any bank holding company making an application to acquire a bank as pro-

vided in §§ 51-16-40 to 51-16-42, inclusive, by such action becomes subject to the jurisdiction of the courts of this state for purposes of any proceedings which may be taken by the commission hereunder, and the bank holding company thereby designates the director as the agent for service of process in connection therewith.

Source: SL 1980, ch. 331, § 2.

51-16-44. Application to federal reserve system — Holding company to provide copy to commission. Any bank holding company which proposes to directly or indirectly acquire ownership of all or substantially all of the shares of a new bank under the provisions of §§ 51-16-40 to 51-16-43, inclusive, shall provide to the commission a copy of any original application to the board of governors of the federal reserve system for permission to take such action, and a copy of any subsequent amendment thereto, at the same time the application or amendment is transmitted to the federal reserve system.

Source: SL 1980, ch. 331, § 3.

APPENDIX F

Excerpts From Senate Debate Regarding The Douglas Amendment Found In 102 Cong. Rec. 6856-62

Mr. Douglas. Mr. President, I call up amendment designated 4-16-56-A offered on behalf of myself and the Senator from Oregon [Mr. Morse], the Senator from Mississippi [Mr. Stennis], the Senator from New York [Mr. Lehman], the Senator from Maine [Mr. Payne], the Senator from North Carolina [Mr. Ervin], the Senator from Wyoming [Mr. D'Mahoney], and the Senator from New Mexico [Mr. Chavez] and ask that it be read.

* * *

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

* * *

[Mr. Douglas.] I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding com-

panies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act.

* * *

Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States. At present no State specifically grants such permission. Therefore the immediate practical effect would be to bar the expansion of bank holding companies across State lines. But the amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided. If they were to do so, then such expansion would be subject to the rules and judgment of the Federal Reserve Board.

Even with my amendment, the Federal Reserve Board would still have final jurisdiction over the acquisition of banks or bank holding companies within a given State, that is, intrastate acquisitions. If and when individual States permitted a bank holding company from another State to acquire assets across State lines, then the Federal Reserve Board would have final jurisdiction in those cases as well.

I wish to repeat that, so far as interstate acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other States, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

Therefore, it is a logical continuation of the principles of the McFadden Act, which tries to prevent the Federal power from being used to permit national

banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

Anyone who favors States rights, it seems to me should support my amendment. I am not urging it on that ground, however. I believe in a somewhat unified banking system. However, so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so.

* * *

[Mr. Bricker.] I should also like to point out that the Douglas amendment runs counter to the policy of the National Bank Act and our dual system of National and State banks. The National Bank Act recognizes the exclusive jurisdiction of the Federal Government over national banks just as the States have exclusive jurisdiction over State banks. The branch banking law is cited as a precedent for giving powers to States over national banks. The branch-banking law is the only major exception to the general rule that the Federal Government has exclusive jurisdiction over national banks.

However, it must be remembered that prior to the McFadden Act of 1927, national banks did not have statutory authority to establish branches. The purpose of the McFadden Act and the Banking Act of 1933 was to permit national banks to compete with State banks in States which authorized State banks to have branches. Congress merely gave national banks equal powers with State banks in respect to branch offices. These acts enlarged the powers of national banks

rather than restricted them.

Certainly it cannot be argued successfully that the branch-banking law is a precedent for permitting States to place restrictions on national banks and take away privileges they now enjoy.

In conclusion, Mr. President, I wish to reiterate that the committee rejected this amendment. The Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and all the bank holding companies are absolutely opposed to it, and I hope the Senate will reject the amendment in the interest of sound banking and the preservation of the competitive system of banking in our country as between the various States and as between the Federal Government and the States.

Mr. PAYNE. Mr. President, I ask unanimous consent to have printed in the RECORD, a statement concerning the amendment offered by the Senator from Illinois, for himself and other Senators, and concerning the bill itself.

* * *

STATEMENT BY SENATOR PAYNE

The junior Senator from Maine would like to speak briefly today in support of bank holding company bill S. 2577, now under debate by the Senate. At the very outset, I would like to emphasize my firm faith in the independent banking system which has been the foundation of economic growth in the United States, the traditional source of capital investment, and the holder of the savings of millions of individual Americans. It is my firm belief that S. 2577 with amendments approved by the Senate Committee on Banking and Currency

and with the additional amendment proposed by the senior Senator from Illinois [Mr. Douglas] will halt the trend toward the destruction of the independent banking system and will preserve independent banking as the financial base of the United States economy.

* * *

[Mr. Payne.] . . . My distinguished colleague, the senior Senator from Illinois [Mr. Douglas] has introduced an amendment ot S. 2577 which I have cosponsored. This amendment would require that State legislatures pass specific legislation authorizing bank holding companies from another State to acquire interests in State banks located within its borders. The purpose of this amendment is to return to the States their traditional control over the activities of the State banks now nominally under the State's authority.

S. 2577 leaves the control of the future expansion of bank holding companies to the discretion of the Federal Reserve Board. It is not my intention to question the capacity of the Federal Reserve Board to carry out the will of the Congress, but it seems to me that the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion rather than to have it solely under the jurisdiction of the Federal Reserve Board.

Mr. President, in this brief statement, I have not attempted to go into the complexities of S. 2577. I have spoken in very broad terms, and have tried only to outline some of the reasons why I am in favor of S. 2577 with the amendment proposed by Senator Douglas. We now have before us a bill which is just and reason-

able. It does not pretend to rectify all the problems in volved in bank holding companies. But it will, if en acted, go a long way toward halting the trend toward overconcentration of financial interests in the United States. The Douglas amendment would reestablish State authority over State banks. I am convinced that it will be in the interests of our banking system and in the interests of all the people of this Nation to enact S 2577 with the Douglas amendment.

* * *

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No. 87-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC.,
Petitioner,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.,
Respondent-Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT FIRST CITY BANCORPORATION OF TEXAS, INC., IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. Whether the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841, *et. seq.* (1982), absolutely prohibits the Board of Governors of the Federal Reserve System ("Board") from approving the acquisition of a national bank by an out-of-state bank holding company.

II. Whether the Board is precluded from approving the acquisition of a national bank in South Dakota by an out-of-state bank holding company because a South Dakota statute places certain limitations on the operation of banks so acquired.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF OF RESPONDENT FIRST CITY BANCORPORATION OF TEXAS, INC.[1] IN OPPOSITION TO PETITION

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[1] Pursuant to Rule 28.1, First City notes that the following are subsidiaries not wholly owned by First City: First City Bank—Farmers Branch; Citizens Bank—Central Arlington, N.A.; First City National Bank of San Angelo; and First City National Bank of Midland.

The Petition fails to state a sufficient basis for review by this Court and the decision below, which thoroughly discussed and rejected the Petitioner's claims, was correct. Respondent (intervenor below) First City Bancorporation of Texas, Inc. ("First City") therefore submits that this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case arises from the organization and operation of a new national bank, First City Bank—Sioux Falls, N.A. ("Bank"), for the primary purpose of offering consumer credit card services.[2] The regulatory activity preliminary to the opening of the Bank began in May 1984 when First City, a bank holding company with its principal place of business in Texas, applied to the Comptroller of the Currency ("Comptroller") for a charter authorizing the establishment of the Bank. Simultaneously, First City applied to the South Dakota Banking Commission ("Commission") for approval under South Dakota law to acquire the Bank's voting shares once the Bank was established. The Commission granted First City's request in July 1984, and in February 1985 the Comptroller granted preliminary approval of the requested national bank charter.

The Petitioner, the Independent Community Bankers Association of South Dakota, opposed First City's application before the Commission. The Commission

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[2] The Bank's credit card services are offered primarily to customers in a regional market consisting of Texas, Louisiana, Arkansas, Oklahoma, Colorado and New Mexico. The Bank also provides other banking services.

nonetheless found that the proposed acquisition by First City was in full compliance with South Dakota law regulating interstate acquisitions, S.D. Codified Laws Ann. §§ 51-16-40 through 42 (Supp. 1986), that the South Dakota law did not conflict with federal law, and that the operation of the new Bank would benefit the citizens of South Dakota. The Petitioner chose not to appeal the Commission's decision and did not participate at all in the proceedings before the Comptroller.[3]

Following the Comptroller's preliminary approval, First City applied to the Board, under section 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842 (1982), for prior approval of First City's acquisition of the Bank's voting shares. Before the Board, the Petitioner asserted that the Board lacked authority to approve *any* acquisition of a national bank by an out-of-state bank holding company, and that limitations the South Dakota statute imposed on the Bank's operations restricted those operations to a degree that conflicted with national banking laws. In July 1985 the Board approved First City's application, rejecting each of the Petitioner's claims. First, the Board determined that the plain language of section 3(d) of the Bank Holding Company Act, known as the "Douglas Amendment," 12 U.S.C. § 1842(d) (1982), authorizes the Board to approve acquisitions of national (as well as state) banks by out-of-state bank holding companies when the state in which the bank to be acquired is located enacts a statute allowing acquisitions of state banks by out-of-state bank

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[3] Therefore, to the extent the Petition can be read to request review of the Comptroller's chartering of the Bank, the Petition must be denied.

holding companies. Joint Appendix ("J.A.") at 37.[4] The Board further determined that the South Dakota statute under which the Commission had acted did not, as applied to the Bank, conflict with any federal law. *Id.* at 39-40. Following the Board's decision, a charter for the Bank was granted by the Comptroller and First City acquired the Bank's voting shares. In August 1985 the Bank began operations.

REASONS FOR DENYING THE WRIT

This case does not present an important question of Federal law.

A. The Plain Language of the Statute Allows the Board to Approve the Acquisition of National As Well As State Banks By Out-of-State Bank Holding Companies.

As explained in the decision below, the Douglas Amendment, 12 U.S.C. § 1842(d), contains two operative provisions regulating the ability of the Board to approve the acquisition of a bank by an out-of-state bank holding company. The first provision prohibits Board approval of an application by a bank holding company to acquire any voting shares of, or interest in, or substantially all the assets of "any additional bank"[5] in another state. The second provision lifts that prohibition if

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[4] The Petitioner has inaccurately labeled the Appendix to the Petition as a "Joint Appendix." For purposes of clarity, First City will retain that designation and thus refer to the Petitioner's Appendix as the "Joint Appendix" or "J.A."

[5] As the Petitioner correctly notes, Petition at 9, the Bank Holding Company Act defines "bank" to include both state and national banks. 12 U.S.C. § 1841(c) (1982).

> the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication.

12 U.S.C. § 1842(d) (1982). Thus, the Board is authorized to approve the acquisition of "any additional bank" by an out-of-state bank holding company if the state in which the bank is located has enacted a qualifying statute. A qualifying statute is one that allows the acquisition of a state bank, *i.e.*, a bank chartered by the state.

The Petitioner's claim, rejected by both the Board and the Court of Appeals, is that a state law can only lift the ban on Board approval of acquisitions of state banks by out-of-state bank holding companies and that national banks are excluded from the permissive portion of the Douglas Amendment. Neither the language of the Bank Holding Company Act nor the structure of the national banking laws supports such an interpretation.

The federal banking laws have traditionally given the Comptroller of the Currency primary responsibility for supervising national banks and given state authorities primary responsibility for supervising state banks. Consistent with this approach, Congress deliberately chose to tie the lifting of the Douglas Amendment's blanket ban on interstate acquisitions of banks in any state to that state's enactment of legislation relating to its own state-chartered banks.[6] Adoption

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[6] Prior to the enactment of section 3(d) of the Bank Holding

of the Petitioner's position would require the Court to read out of the first portion of the Douglas Amendment the reference to "any additional Bank" and to replace that language with the term "State bank" found in the second operative provision of section 1842(d). The Court of Appeals correctly held that the Petitioner's "tortured reading" of the Douglas Amendment, which would upset the carefully crafted, parallel treatment of state and national banks, "is incompatible with the actual language of the statute." J.A. at 12.

Adoption of the Petitioner's theory would also destroy the legal basis for numerous acquisitions of national banks by out-of-state bank holding companies that the Board has approved to date,[7] including acquisitions under failing bank and regional reciprocal

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Company Act, the same concept had been applied in the bank branching context, as evidenced by the McFadden Act, 12 U.S.C. § 36 (1982). In that Act,

> Congress intended "to leave the question of the desireability of branch banking up to the state" . . . and to permit branch banking by national banks " 'in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking.' " [First National Bank v. Walker Bank & Trust Co., 385 U.S. 252,] 259 (quoting Sen. Glass, 76 Cong. Rec. 2511 (1933)).

Northeast Bancorp v. Board of Governors, 472 U.S. 159, 171-72 (1985). The legislative history of section 3(d) of the Bank Holding Company Act, as well as the language of the statute, shows that the intent of the Douglas Amendment was to apply a parallel approach to bank holding company acquisitions of banks across state lines. *Id.;* J.A. at 14-16.

[7] The Petitioner concedes that for fifteen years, "the Board has *routinely* approved" the acquisition of national banks pursuant to section 1842(d). Petition at 7 (emphasis added).

statutes. Indeed, approvals of applications for the acquisition of national banks were among those before this Court in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,* 472 U.S. 159, 165 (1985) (*"Northeast Bancorp"*), although the precise question now raised was not addressed there. The Board's consistent interpretation of the statute as permitting such acquisitions is entitled to considerable weight, *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System,* 468 U.S. 137, 142 (1984), and should not be overturned absent "compelling indications it is wrong." *Red Lion Broadcasting Co. v. Federal Communication Comm'n,* 395 U.S. 367 (1969) (footnote omitted). The Petition presents no indication, much less a "compelling" one, that the Board's longstanding interpretation is wrong.

B. This Case Presents No Conflict Between State and Federal Law.

Alleging conflicts between the South Dakota law and unspecified provisions of the "national banking laws," the Petitioner urges that the Court should review this case in order to address "serious public policy questions" and to provide "interpretive construction and elucidation" of the national banking laws. Petition at 14. Similarly, the Petitioner pleads with this Court to address the "debatable questions" it presents and to resolve unstated "uncertainties" regarding the possible future impact of South Dakota's exercise of the authority given to it by the Douglas Amendment. Petition at 16-17. This rhetoric cannot hide the fact that the Petitioner's request is one for an advisory opinion on matters not presented by this case.[8]

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[8] The Petitioner's standing to raise this issue is highly ques-

The Petitioner claims that the Court must invalidate both the Board's order and the South Dakota statute[9] on the ground that, under the Douglas Amendment, the states cannot impose any condition on the operation of a national bank acquired by an out-of-state bank holding company. Yet this Court recently held that the Douglas Amendment does not preclude the imposition of conditions on the entry of out-of-state bank holding companies and that a state is to be allowed "flexibility in its approach." 472 U.S. at 171. South Dakota has exercised its flexible authority in a manner that the Board, the agency responsible for interpretation of the Bank Holding Company Act, has found does not violate the Act. J.A. at 39. Likewise, the Comptroller, who is responsible for granting charters and supervising national banks under the National Bank Act, has determined that the operation of the Bank under the terms of the Commission's order does not run afoul of that statute. *See* J.A. at 26-27.[10]

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tionable. The Petitioner is an association of independent South Dakota banks. The limited restrictions on bank operations contained in the South Dakota legislation at issue do not apply to the Petitioner's member banks. Indeed, they were specifically designed to protect existing South Dakota banks—including the Petitioner's member banks. First City does not see how such provisions can even arguably harm the Petitioner or its member banks.

[9] As noted previously, the Petitioner did not appeal the Commission's order approving First City's acquisition of the Bank.

[10] Matters regarding the scope, issuance, and operation of national bank charters are properly within the jurisdiction of the Comptroller of the Currency; his views are to be given "great weight." Investment Company Institute v. Camp, 401 U.S. 617, 626 (1971).

On appeal, the Petitioner sought to have the court below find a conflict between the South Dakota statute and the McFadden Act, 12 U.S.C. § 36 (1982). That court correctly found that no such conflict exists.[11] As the Court of Appeals held, the South Dakota statute, which provides for limitations on branching by *any* bank, state or national, that is owned by an out-of-state bank holding company, is completely consistent with the concept of equality of treatment contemplated by the McFadden Act. *See* J.A. at 23-24.

Equally unavailing is the Petitioner's effort to secure Court review by reference to the "concern, on the part of both the Board and the Court of Appeals, about the trend toward the establishment of limited service banks controlled by out-of-state bank holding companies." Petition at 14. While expressing such concern, both the Board and the court below permitted First City's acquisition to proceed. The Board and the Comptroller retain the ability to monitor the future application of the South Dakota statute. Under these circumstances, the court below refused the Petitioner's invitation, now pressed upon this Court, to speculate "regarding future application of South Dakota's special purpose statute," Petition at 14, concluding instead that "[t]he South Dakota statute . . . as presently interpreted . . . does not conflict with the National Bank Act and other federal banking statutes." J.A. at 28. The Petitioner's vague assertions of future conflicts provide no basis for review of that conclusion.

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[11] This argument was never raised before the Board and was thus not an issue that the court below had to decide. *See* Washington Ass'n for Television & Children v. Federal Communications Comm'n, 712 F.2d 677 (D.C. Cir. 1983).

Finally, no basis for review is provided by the Petitioner's assertion that "the flag is raised" by the South Dakota statute and that therefore "banking laws need to be overhauled to conform with federal law." Petition at 14. "Overhauling" statutes is not the province of this Court or of the Board. If there is a need for changes in the national banking laws, Congress is the appropriate forum to "define the boundaries for making these changes." *Id.*

Because the Petition presents no argument requiring the Court's attention, this Court should deny the writ.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC., PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC., PETITIONER

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner argues that states may not authorize the acquisition of in-state national banks by out-of-state bank holding companies.

1. Section 3 of the Bank Holding Company Act of 1956 (the BHCA), 12 U.S.C. 1842, provides that a bank holding company must obtain the approval of the Federal Reserve Board (the Board) before acquiring a bank or substantially all of a bank's assets. Section 3(d) of the BHCA, which is generally referred to as the Douglas Amendment, prohibits the Board from approving a bank holding company's application to acquire any interest in "any additional bank located outside of the State in which" the bank holding company maintains its principal operations. But the Amendment permits such interstate acquisitions if "the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is

specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. 1842(d).

This case arises out of the application of First City Bancorporation of Texas, Inc. (First City), a Houston-based bank holding company, to acquire a newly-organized national bank based in Sioux Falls, South Dakota. By statute, South Dakota expressly permits out-of-state bank holding companies to acquire newly-organized state-chartered and national banks located in South Dakota, as long as the acquired bank has only a single office, and is located and operated in such a manner that it is "not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state." S.D. Codified Laws Ann. §§ 51-16-40, 51-16-41 (Supp. 1987).[1] Pursuant to the provisions of this South Dakota law, First City applied to the state banking commission for permission to acquire a newly organized national bank that would conduct First City's credit card operations, which are directed to customers outside South Dakota. The state banking commission approved the proposed acquisition over petitioner's objections, subject to the necessary approvals of the Comptroller of the Currency (the Comptroller) and the Board. After the Comptroller approved the organization of a new national bank, First City sought the Board's approval to acquire the bank (see Pet. App. A6-A7).

2. Petitioner filed comments before the Board, offering two objections to approval of the application. First, petitioner argued that the Douglas Amendment authorizes states to permit the interstate acquisition only of state-chartered banks and not of nationally-chartered banks

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[1] The South Dakota banking commission also has the power to place such additional conditions on its approval of such acquisitions as it "deems necessary" (§ 51-16-42), but this authority has never been exercised (see Pet. App. A28).

(see Pet. App. A36-A37). Second, petitioner argued that, even if the Douglas Amendment generally permits interstate acquisitions of national banks by bank holding companies, the conditions placed by South Dakota law on the operations of First City's newly chartered national bank in this case conflict with other federal banking laws (see *id.* at A38-A39).

The Board rejected both of petitioner's arguments. Relying upon the language and the legislative history of the Douglas Amendment, the Board concluded that the Amendment "applies to the interstate acquisition of any bank, national or state-chartered" (Pet. App. A37). The Board noted that the Amendment's initial clause prohibits approval of the interstate acquisition of "any additional bank," including both national and state-chartered banks; the second clause outlines the circumstances under which a state may "authorize such an acquisition" (*ibid.* (emphasis omitted)). As the Board concluded, "when the flat prohibition on interstate bank acquisitions is lifted by a state with respect to state banks, the Douglas Amendment itself lifts the prohibition * * * with respect to national banks" (*id.* at A38).

The Board also found "no merit" in petitioner's argument that the South Dakota statute conflicts with other federal banking laws (Pet. App. A39). The Board noted that state restrictions on national banks that have been acquired by virtue of the Douglas Amendment are authorized by the Amendment itself (*ibid.*). And the Board held that, in any event, the South Dakota restrictions do not conflict with the federal law setting out the powers of national banks; in reaching this conclusion, the Board relied upon a previous finding by the Comptroller that the South Dakota statute does not "so restrict the operations of the proposed bank as to be incompatible with the framework of federal law" (*ibid.* (quoting Op. Comp. Curr. on the Application to Charter City Banks (South Dakota), N.A., at 12 n.8) (Nov. 11, 1980)).

3. Petitioner then filed a petition for review in the Court of Appeals for the District of Columbia Circuit, which affirmed the Board's determination (Pet. App. A1-A29). The court found petitioner's reading of the Douglas Amendment to be "tortured" and "incompatible with the actual language of the statute" (*id.* at A12). Instead, the court concluded that "[t]he plain meaning of the Amendment in its entirety supports the Board's reasoning," adding that "nothing in the legislative history even remotely suggests a congressional intent contrary to Congress' chosen words" (*id.* at A12, A13). The court also affirmed the Board's holding that the South Dakota restrictions do not conflict with federal banking laws, finding that the Comptroller had reasonably determined that the restrictions do not "undermine[] the safety and soundness of the bank or interfere[] with the bank's ability to fulfill its statutory obligations" (*id.* at A27).[2]

4. The decisions of the Board and the court of appeals are clearly correct and, as petitioner concedes (see Pet. 7, 13), do not conflict with any decision of this Court or any other court of appeals. Review is therefore unwarranted.

a. Relying on the Douglas Amendment, the Board has repeatedly and consistently approved the interstate acquisition of national banks by bank holding companies.[3]

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[2] The court did reject the Board's alternative view that the South Dakota restrictions were affirmatively authorized by the Douglas Amendment (Pet. App. A18-A23). There is no need to consider the validity of this conclusion, however, because the court plainly was correct in finding that South Dakota and federal law do not conflict.

[3] As the court of appeals noted, for the past 15 years the Board has "routinely" approved the acquisition of national banks by out-of-state bank holding companies where permitted by state law (Pet. App. A9). See, *e.g.*, *First Kentucky Nat'l Corp.*, 70 Fed. Res. Bull. 434 (1984); *Bank of New England Corp.*, 70 Fed. Res. Bull. 374 (1984); *BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983); *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982); *Citicorp*, 67 Fed. Res. Bull. 181 (1981). Indeed, the Board decision in *Bank of New England Corp.* was affirmed both by the Second Circuit and by this Court without any suggestion that the acquisition of national banks might pose special problems under

The Board, of course, is an "authoritative voice on the meaning of a federal banking statute" (*Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 168 (1985)), and its interpretation thus is entitled to "substantial deference." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 142 (1984). Indeed, since petitioner concedes that federal law in this area is "ambiguous" (Pet. 10) at best, the Board's interpretation must be upheld so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

b. The Douglas Amendment reads, in pertinent part:

> [N]o application * * * shall be approved * * * which will permit any bank holding company * * * to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of *any additional bank* located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted * * * *unless* the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. 1842(d) (emphasis added). The Amendment thus generally prohibits out-of-state bank holding companies from acquiring state *or* national banks within a state ("any additional bank") "*unless*" state law "specifically authorize[s]" the acquisition "of a State bank by an out-of-State bank holding company." The only reasonable reading of the statutory language, and in particular of Congress's use of the word "unless," is that when a state chooses to permit the acquisition of state banks by out-of-

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the Douglas Amendment. *Northeast Bancorp* v. *Board of Governors*, 740 F.2d 203 (2d Cir. 1984), aff'd, 472 U.S. 159 (1985).

state holding companies, federal law automatically permits the acqusition of national banks in that state. As the court of appeals explained (Pet. App. A12 (emphasis in original)):

> By its terms, the first clause of the Amendment prohibits the interstate acquisition of both state and national banks. The second clause provides that this carte blanche prohibition stands *unless* the state permits the interstate acquisition of 'such shares or assets of a State bank.' The ordinary meaning of the language compels the conclusion that the entire prohibition lifts upon the state's authorization of interstate acquisition of a 'State bank' located within its borders.

The Amendment's legislative history also supports the Board's interpretation. As this Court recognized in *Northeast Bancorp*, the Douglas Amendment was "[intended] to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act." 472 U.S. at 171; see also 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas). The McFadden Act, 12 U.S.C. 36(c), was intended to promote "competitive equality" between state and national banks by permitting national banks to branch within their home states to the same extent that those states allow state banks to branch. See *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 133 (1969). In this case, state and national banks can be treated comparably only if the Douglas Amendment is interpreted to permit the acquisition of both national and state banks by out-of-state bank holding companies, once the acquisition of state banks is permitted by state law. In contrast, petitioner's interpretation would treat state and national banks differently by prohibiting the acquisition of national, but not of state, banks.[4]

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[4] Petitioner's assertion that the purpose of the Douglas Amendment was to "facilitate state's rights" (Pet. 10), even if accurate, is beside the

c. The South Dakota banking statute also does not "place impermissible restrictions on the operations of national banks" acquired by out-of-state bank holding companies, as petitioners assert (Pet. 13). A state law affecting the operation of national banks is invalid only if it "expressly conflicts" with federal law, "and either frustrates the purpose of such national legislation or impairs the efficiency of [national banks] to discharge the duties, for the performance of which they were created." *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896).[5] In this case, the Board correctly relied upon the Comptroller's adherence to his earlier determination (made during his consideration of a previous application by another out-of-state bank holding company) that the South Dakota statute at issue here does not so limit the operation of national banks "as to be incompatible with the framework of federal law" (Pet. App. A39 (quoting Op. Comp. Curr. at 11-12 (Nov. 19, 1980))).

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point: petitioner's reading of the Amendment would divest anyone of power to permit out-of-state bank holding companies to acquire in-state national banks, even if, for example, the national bank was a failing institution. Thus, far from advancing states' rights, petitioner's interpretation would frustrate the efforts of the states to promote the health and safety of their banking industries. Petitioner also relies on remarks by Senator Payne (Pet. 10-11 (citing 102 Cong. Rec. 6862 (1956)). But as the court of appeals noted (Pet. App. A14), "[i]t is difficult to discern" whether Senator Payne approved of the interstate acquisition only of state-chartered banks or rather of all banks located within a given state.

[5] Contrary to petitioner's assertion (Pet. 16), *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), did not hold that the Douglas Amendment forbids all state restrictions on bank holding company activities. *Lewis* stated only that is was "doubtful" that the Douglas Amendment had *expanded* the scope of permissible state regulation by affirmatively "authoriz[ing] state restrictions" (*id.* at 47), although the Court made it clear that states may enact laws (such as the one in this case) that permit forms of interstate banking that otherwise would be barred by federal laws. *Lewis* leaves the states free to exercise their traditional power to regulate national banks, so long as that regulation does not conflict with federal law.

As the Comptroller observed, there is no requirement in the National Bank Act (the statute that delimits the authorized activities of national banks) that banks engage in the full range of activities that are permitted by federal law. The Comptroller also noted that the choice not to engage in particular activities "is a business decision which does not necessarily result in a course of action incompatible with the National Bank Act or other federal statutes" (see Pet. App. A25 (quoting Op. Comp. Curr., *supra*, at 12 n.8)). And the Comptroller found that the South Dakota restrictions pose no danger to the safety and soundness of national banks (see Pet. App. A25). These judgments, as the court of appeals correctly noted, "require consideration of the particular legal and business circumstances of the individual banks" and thus are "within the particular expertise of the Comptroller and reserved to his chartering authority" (*id.* at A27).[6] The Board was therefore justified in relying upon the Comptroller's determination that there was no conflict between federal banking law and the South Dakota statute in this case.

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[6] This Court has recognized that the Comptroller's decisions concerning the National Bank Act are entitled to great weight. *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). And the Comptroller has repeatedly approved the chartering of national "credit card" banks. See *Deposit Guaranty Corp.*, 71 Fed. Res. Bull. 807 (1985); *First Kentucky Nat'l Corp.*, 70 Fed. Res. Bull. 434 (1984); *Citicorp*, 70 Fed. Res. Bull. 431 (1984); *First Maryland Bancorp*, 68 Fed. Res. Bull. 320 (1982); *Provident Nat'l Corp.*, 68 Fed. Res. Bull. 260 (1982).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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No. 87-397

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

INDEPENDENT COMMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC.,
Petitioner,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.,
Respondent-Intervenor

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

JOINT REPLY OF PETITIONER TO BRIEFS IN OPPOSITION OF THE RESPONDENT AND INTERVENOR

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Respondent-Intervenor.

INTRODUCTORY COMMENTS

This brief is intended as a joint reply to the respective briefs of the other parties.

REPLY TO FEDERAL RESERVE BOARD BRIEF

The Board acknowledges that the de novo national bank established in South Dakota must, under South Dakota law, have only a single office, which office must be located and operated in such a manner that it is "not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state." (FRB 2) This is significant because there is no provision whatsoever in federal banking law authorizing a state to so condition or restrict the activities of a national bank. This is an unlawful state restriction and conditioning of a national bank's inherent banking functions. That is, the state law impermissibly restricts and prohibits a national bank from freely competing in the marketplace.

Next, the Board notes that, in any event, the national bank is really only contemplating "credit card operations which are directed to customers outside South Dakota." (Ibid.) In other words, the only nexus of the national bank to South Dakota is its charter. This makes a mockery of national banking law.

The Board concludes that, "when the flat prohibition on interstate bank acquisitions is lifted by a state with respect to state banks, the Douglas Amendment itself lifts the prohibition * * * with respect to national banks." (FRB 3) This is not what the Douglas Amendment says. All parties agree that the Douglas Amendment by its first clause prohibits the acquisition of an out-of-state bank holding company of any bank. The second clause of the relevant part of the Douglas Amendment provides that a state may authorize the

acquisition by an out-of-state bank holding company of a "State bank". At the time the Douglas Amendment was adopted, the term "State bank" was expressly defined as meaning a state chartered bank. Both the Board and the Intervenor argue that the Douglas Amendment language authorizing an out-of-state bank holding company to acquire a "State bank" somehow or another automatically includes authorization to acquire a national banking association under the parallel of the McFadden Act. However, even a cursory look at the language of the McFadden Act refutes that contention. The McFadden Act relates to branching. The McFadden Act provides that a national banking association may branch in a state to the same extent that a state authorizes a state bank to branch. There is no such parallel language in the Douglas Amendment. In other words, the Douglas Amendment does not state that if a state authorizes an out-of-state bank holding company to acquire a state bank, then, in that event, the holding company may also acquire a national banking association. Congress chose to limit the Douglas Amendment language to authorization for the acquisition of a "State bank" at a time when the term "State bank" was clearly and definitively defined as being limited to a state chartered bank.

The Board next states that it also found "no merit" in Petitioner's argument that the South Dakota statute conflicts with other "federal banking laws." (FRB 3) However, what could be more of a conflict than for a state, without congressional authorization to prohibit a national bank from competing in the marketplace?

The Board states that in concluding that the South Dakota restrictions do not conflict with federal bank laws, it relied on a previous finding of the Comptroller

of the Currency that the South Dakota statute does not "so restrict the operations of the proposed bank as to be incompatible with the framework of federal law." (Ibid) The Petitioner responds by saying that any such findings or conclusions by either the Board or the Comptroller fly in the face of common sense and the national banking laws. The South Dakota restrictions on the national bank are fundamental violations of a national bank's right and power to freely compete in the marketplace without unauthorized state interference.

The Board points out that the U.S. Court of Appeals for the District of Columbia "did reject the Board's alternative view that the South Dakota restrictions were affirmatively authorized by the Douglas Amendment." (FRB 4, footnote 2) If the South Dakota restrictions were not affirmatively authorized, how can they be implied? There is neither any language in the Douglas Amendment nor any congressional history supporting such implication.

The Board points out that for the past 15 years it has "routinely" approved the acquisition of national banks by out-of-state bank holding companies. (Id., footnote 3) However, what the Board is saying is that those acquisitions have never been challenged.

The Board announces that it is an "authoritative voice on the meaning of a federal banking statutes." (FRB 5) While that may be generally true, it is not an absolute. Again, the fact that the Board's interpretations may be entitled to "substantial deference" does not mean that it cannot be wrong. This is especially so concerning a question of law as opposed to a finding of fact. While courts generally defer to an administrative agency's expertise in fact finding, such deference is not

required as to an issue of law which the court may as readily ascertain.

As a critical point, the Board states that the Douglas Amendment, like the McFadden Act "was intended to promote 'competitive equality' between state and national banks . . ." In other words, the McFadden Act was intended to promote "competitive equality" between state and national banks within a given state. The Board seems to overlook its interpretation of the Douglas Amendment which authorizes a state to restrict and condition a national bank so as to prohibit it from freely competing with other banks within South Dakota. The Board is inconsistent in its argument and application of the McFadden Act and the Douglas Amendment.

The Petitioner argues and contends that the South Dakota restrictions on the national bank destroy "competitive equality" between the national bank and other state and national banks in South Dakota.

It is the Board and the Intervenor whose interpretations would result in state and national banks being treated differently in South Dakota due to the state's prohibitions on free competition on the national bank.

The Board, itself, states the law as follows:

> "A state law affecting the operation of national banks is invalid only if it 'expressly conflicts' with federal law, 'and either frustrates the purpose of such national legislation or impairs the efficiency of (national banks) to discharge the duties, for the performance of which they were created.' "

This is precisely what the South Dakota law does under the Board and Intervenor's interpretation of the Douglas Amendment.

The Board states that the, "Petitioner's reading of

the amendment would divest anyone of power to permit out-of-state bank holding companies to acquire in-state national banks . . ." (FRB 7) The Board seems to forget that it is the Congress which determines if "anyone" should have the power to permit out-of-state bank holding companies to acquire in-state national banks. If Congress had desired to have anyone to have the power to permit out-of-state bank holding companies to acquire in-state national banks, the Congress could have so provided in the Douglas Amendment.

It is said that the comptroller has determined that the choice not to engage in particular activities "is a business decision which does not necessarily result in a course of action incompatible with the National Bank Act or other federal statutes." (FRB 8) However, the choice in the present case is not voluntary. It is the South Dakota statute which prevents the national bank from engaging in its regular and normal banking activities. The bank holding company has no choice.

REPLY TO INTERVENOR'S BRIEF

The Intervenor's brief parallels the Board's brief in many respects. The reply comments above apply equally to the brief of the Intervenor.

The Intervenor states that the Petitioner "chose not to appeal from the (South Dakota) Commission's decision and did not participate at all in the proceedings before the Comptroller." (IB 3) First of all, the Petitioner could not have appealed the South Dakota Commission's decision. It was not final. The Commission's decision was contingent upon approval of the acquisition by the Board of Governors of the Federal Reserve.

Further, as acknowledged by the Intervenor, the Comptroller's decision is likewise contingent upon the

decision of the Board. It is the Board's decision which is paramount and foundational to the others.

Most importantly, we are here dealing strictly with issues of law. The Comptroller had earlier approved Citibank's application for a de novo national bank in South Dakota and had publicly annunciated a policy and philosophy of continuing such approvals. The Petitioner should not have been required to do that which have been fruitless in any event.

The Intervenor continues to attempt to confuse the Court on the issue of bank holding company definition of the term "bank". (IB 4, footnote 5) The term "bank" as presently defined in the Bank Holding Company Act is generic including both state and national banks. However, at the time the Douglas Amendment was adopted the Bank Holding Company Act separately defined the terms "State bank" and "national banking association" for purposes of the Act. The term "State bank" was a term of art specifically defined by the Act as meaning only a state chartered bank. The Douglas Amendment utilized the term "State bank" in its exemption to the blanket prohibition on the acquisition of any "bank" by an out-of-state bank holding company. Thus, the point is that the Congress chose to exempt acquisitions of a "State bank" only.

The statement of the Intervenor that, "neither the language of the Bank Holding Company Act nor the structure of the national banking law supports such an interpretation" does not hold water. The entirety of the limited congressional record on the Douglas Amendment demonstrates that it was based exclusively and entirely upon concepts and principals of states' rights. The law was clear at the time of the adoption of the Douglas Amendment that states could not impair

or regulate national banks. States as recognized in the Respondent's brief are limited to the regulation of State banks, except as authorized by Congress and where the state regulation does not conflict with federal law. A state's restriction or condition as in this case which does not allow a national bank to compete with any bank in South Dakota is a per se conflict with federal banking law which contemplates that a national chartered bank is free to compete as it chooses without state restrictions.

The McFadden Act expressly delegated to the states the right to control branching of national banks. There is a marked difference in allowing a state to control branching of a national bank, as opposed to prohibiting a national bank from freely competing in the marketplace.

The Intervenor supports the Petitioner's argument when it states that it is the "state authority's primary responsibility for supervising State banks." (IB 5)

The Intervenor states that the adoption of the Petitioner's theory would "destroy the legal basis for numerous acquisitions of national banks by out-of-state bank holding companies that the Board has approved to date, including acquisitions under failing bank and reasonable reciprocal statutes." (IB 6-7) It is the Congress which establishes the "legal basis" for such acquisitions and the Board should not be delving into legislative policy. It is the Petitioner's position that the Board in this instance has crossed the line into the legislative arena and thus exceeded its lawfully delegated authority to the extent it has authorized such acquisitions now or in the past without clear statutory guidance. This is not a case where the Board is simply supplying details for a stated congressional policy, for

there is no legislation enacted by Congress clearly pronouncing that the Board may authorize acquisitions in the area of failing banks or regional reciprocal agreements. If Congress wanted to do so, it could readily do so. The fact that these past acquisitions have not been challenged is irrelevant. The Board in actuality is balancing "economic and social concerns" and this type of balancing of interest is "uniquely legislative" and should be left to Congress. If Congress wants to bail out failing banks it could clearly do so by statutory language to that effect. It has not done so. The Board is legislating.

Intervenor states that the Petitioner alleges conflicts between the South Dakota law and "unspecified provisions of the national banking laws" in urging that this Court review this case. (IB 7) The conflict is the fact that the South Dakota law absolutely prohibits a national bank from competing in the marketplace. What could be a more fundamental conflict with federal banking law.

The Board and Intervenor also attempt to confuse the Court by commingling the concepts of restrictions on a bank holding company's right to enter a state, as opposed to restrictions or conditions on the national bank, itself. This case is totally distinguishable from any other case ever decided by any federal appeals court or the U.S. Supreme Court. The issue as agreed by the parties is novel.

Intervenor states that this Court must invalidate both the Board's order and the South Dakota statute in order to hold for the Petitioner (IB 8) This is not at all the case. The Petitioner claims that the Board abused its discretion and acted contrary to law by approving the application in light of the clear conflict of the South

Dakota statute with federal law. The relief sought by the Petitioner is to reverse the action of the Board. The Petitioner does not seek the invalidation of the South Dakota statute. That is not an issue.

The Intervenor referring to the Northeast Bancorporation 472 U.S. 159 (1985), argues that the South Dakota statute fettering a national bank is permissible because this Court has held that the state is to be allowed "flexibility in its approach" concerning the entry of a bank holding company. (IB 8) However, there is as mentioned a difference to be made between a state's conditioning the entry of a bank holding company on the one hand, and placing actual restrictions on a national banking association as in this case on the other.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that the Court grant certiorari.

Dated this 31st day of December, 1987.

Respectfully submitted,

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